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Supreme Court of the United States,

No. 61, OF OCTOBER TERM, 1892.

JOHN E. ALEXANDRE, et al., Exrs., etc.

Claimants of the American Steamship City of New York, etc.

Appellants.

vs.

JOHN MACHAN, et. al.

Owners of the British Bark Helen,

Libellants and Appellees.

Brief for Appellants

A. OLDRIN SALTER,

Appellants' Proctor.

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1892

Supreme Court

OF THE UNITED STATES.

JOHN E. ALEXANDRE *et al.*, Exrs. etc.,
Claimants of the American Steamer
"CITY OF NEW YORK," etc.,
Appellants,

vs.

JOHN MACHAN *et al.*, owners of the
British Bark "HELEN,"
Libellants and Appellees.

Brief for Appellants.

This is a cause of collision. The libellants, owners of the British bark *Helen*, filed their libel in the Southern District of New York against the steamship *City of New York* to recover damages for the loss of the *Helen*, which was sunk in a collision with the steamer off the coast of New Jersey at about 10.50 P. M. on the night of June 28, 1879. The District Court held both vessels in fault and apportioned the damages. Both parties appealed to the Circuit Court. That Court (Wallace, *J.*) reversed the decree and held the steamer wholly in fault; and from the decree entered on his decision the owners of the steamer appeal to this Court.

Facts of the Collision.

The steamer was going down the coast of New Jersey, heading about S. by W., ½ W. She was running at full speed of about 11 miles an hour. About half an hour before the collision a fog set in, but the speed of the steamer was not then checked. The fog horn of the bark was heard by the steamer's second mate, Johnson, who was in charge of her navigation two minutes before the collision, bearing about a point on the steamer's starboard bow. Her helm was at once starboarded to avoid the approaching vessel, and she ran under a hard a starboard wheel at least a minute. She then saw the sails of the bark a little on her starboard and saw that her course was eastward across the steamer's bow and that she was swinging to her starboard. The steamer's engine was instantly stopped and her wheel ported, but she struck the bark on the port side just forward of her mizzen rigging, and sunk her.

The bark was coming up the coast of New Jersey in charge of her mate, Taylor. Her captain was below and was drowned in the collision.

The libellants, claim was that the bark kept her course until the instant before the collision when her helm was ported and her course changed a little to starboard.

The claim of the steamer was that the bark was coming up the Jersey coast on the regular course of about N. E. by N. (having a wind almost astern), and was on the steamer's starboard bow ; that the steamer by the starboarding of her wheel would have cleared the bark, if she had not changed her course by porting across the steamer's bows, so that at the collision she was heading about east ; and that when this change of her course was seen it was too late for the steamer to avoid her by porting and stopping and reversing as she did.

Specification of Errors.

The decree of the Circuit Court was erroneous (1) in that it decreed in favor of the libellants; (2) in that it did not decree in favor of the respondents; (3) in that, if it did not decree absolutely in favor of the respondents, it did not decree that both vessels were in fault and apportion the damages; (4) in that it decreed that part of the decree of the District Court in the case should be reversed.

And the Judge erred in admitting as evidence bearing upon the heading of the bark at the collision the following evidence of Haggerty (fol. 154):

"To the best of my judgment now, the bark as she lay on the bottom, lay headed up the beach about northward and eastward—about north northeast.

Q. On a line parallel with the beach?

A. Yes, about north northeast."

FIRST POINT.

The main questions in the case on this appeal group themselves around the Second Conclusion of Law of the Circuit Judge, viz., that the bark's change of course was an error *in extremis.*

This was an error of law on the part of the Circuit Judge, before discussing which one or two preliminary considerations must be presented.

a. The libel in the District Court substantially alleged that the change of course of the bark was a change *in extremis.* The answer denied it, alleging that the bark "changed her course under her port wheel four or five points before the collision and that at the time of the collision she was heading

about east," her previous course having been northeast or something north of that.

b. The District Court decided in favor of this contention of the steamer. The District Judge found that the course of the bark, before she changed, was N. E., and that her course at the collision was "as all the witnesses agree, about E. or E. by N.," (fol. 42) which made a change of three or four points to the eastward, and he said (fol. 49), "this change of three or four points was too great and was commenced too early and too far off from the steamer to be regarded as a change *in extremis.*"

c. The Circuit Judge did not disagree with this proposition. For he says in his opinion (fol. 189): "It is insisted for the claimant that the bark changed her course four or five points to the starboard. *Doubtless, if this were true, such a change could not have been made when the vessels were within two or three hundred feet of each other. If it could be demonstrated that at the time of the collision the bark was headed about east, and that her course previous to the change was N. E., the argument for the steamer would be convincing.*"

d. And yet notwithstanding this agreement of the Circuit and District Judges on this proposition, the Circuit Judge held that the change of the bark's course was "an error *in extremis.*"

SECOND POINT.

The findings of fact as filed by the Circuit Judge do not sustain his conclusion of law that the bark's change of course was *in extremis.* **Their words contradict it.**

a. The third finding (fol. 176) states that "until within about three or four minutes before the collision the vessels had been approaching each other, * * * *the course of the bark being about N. E.*"

The fifth finding (fol. 177) states that after the steamer's helm had been starboarded and about a minute before the collision, "those in charge of the steamer then discovered that the bark's course *was eastward across the steamer's bow.* The steamer then sounded successive whistles of alarm and those in charge saw the bark luffing to the starboard."

And the same finding concludes "the bark, after she luffed, changed her course one or two points by the time the vessels came together."

b. These findings, as they stand, are that the bark's course was about N. E. *until* about three or four minutes before the collision (which involves the conclusion that it was *then* changed); that at about a minute before the collision her course was eastward (which is a change of four points), that afterward she was *seen to be* luffing, and that after she luffed she changed her course one or two points by the time the vessels came together.

c. If the bark changed her course three or four minutes before the collision, and changed her course from northeast to eastward or one or two points farther than that, she made a change of from four to six points.

d. Such a change, by the language of the Circuit Judge himself, is not an error *in extremis.*

e. But I suppose it will be claimed for the libellants, that the Circuit Judge did not intend to be understood as finding that the course of the bark was at any time east, although he found that her course was "eastward"; that his finding that the bark "after she luffed changed her course one or two points by the time the vessels came together", was intended to be a finding that the total change from her course of N. E. was only one or two points, or, in other words, that her course when the vessels came together was N. E. by E. or E. N. E.

This would involve the conclusion that the Circuit Judge, when he found that the bark was "heading

eastward", did not mean that she was heading east.

But if he meant that she was still heading N. E. that is inconsistent with his finding that her heading was N. E. *until* about three or four minutes before the collision—and if she was not heading northeast, what else is to be understood by "*eastward*" except *east?*

The finding, therefore, that the bark was heading eastward is inconsistent with a finding that the total change of the bark was one or two points from N. E.

Referring, however, to the language of the opinion of the Circuit Judge, it seems quite plain that what was in his mind *at one time* as the change of the bark's course which he held to be "an error *in extremis*", was only a change of one or two points. This would give her a heading at the collision of N. E. by E. or E. N. E. He does not, however, find that such was her heading; and it is equally plain from his opinion that *at another time* his idea of her actual heading was that she was heading not E. N. E. but N. N. E. or four points further to the northward.

There seems to have been a confusion in the Judge's mind, which led to error in his opinion and contradiction in his findings of fact.

This we shall speak of later.

THIRD POINT.

Assuming, however, that the findings are to be taken to mean that the course of the bark was changed only a point or two in all, then we say that such a finding was contrary to the pleadings and to all the evidence in the case; that the other findings which the Circuit Judge made are inconsistent with it; and that a finding on this question, which shall agree with his finding on the main issue in the case and with the pleadings and evidence, requires the conclusion of law that the bark's change of course was not an error *in extremis*, **but faulty navigation, which certainly contributed to, and which we claim to have been the cause of, the collision.**

The condition of the issues on the pleadings and the trial—in the District Court—must first be set forth in order to a proper understanding of the questions which arise on this branch of the case.

a. The libel in the District Court alleged that the wind was W. S. W. and that the bark, before she heard the steamer's whistle, was "heading *east by north* ½ *north*, running free" (fol. 2), and that the bark's helm was ported before the collision, which porting "did not alter the course of the bark more than a point and in a direction away from the approaching steamer", (id.) *thus making her heading at the collision east* ½ *north.*

The answer of the steamer denied that the wind was W. S. W. or that the bark was heading E. by N. ½ N. (fol. 7).

It alleged that the wind was about S. (fol. 8); that the course of the bark was nearly, if not quite opposite to that of the steamer, which course was S. by W. ½ W., and that the bark "changed her course under her port wheel four or five

points before the collision and that at the time, of the collision she was heading about E. and the steamer was heading about S. or S. by W." (fol. 9).

This pleading of the steamer, therefore, set up the defense of a change of course on the part of the bark before the collision of four or five points across the steamer's bows.

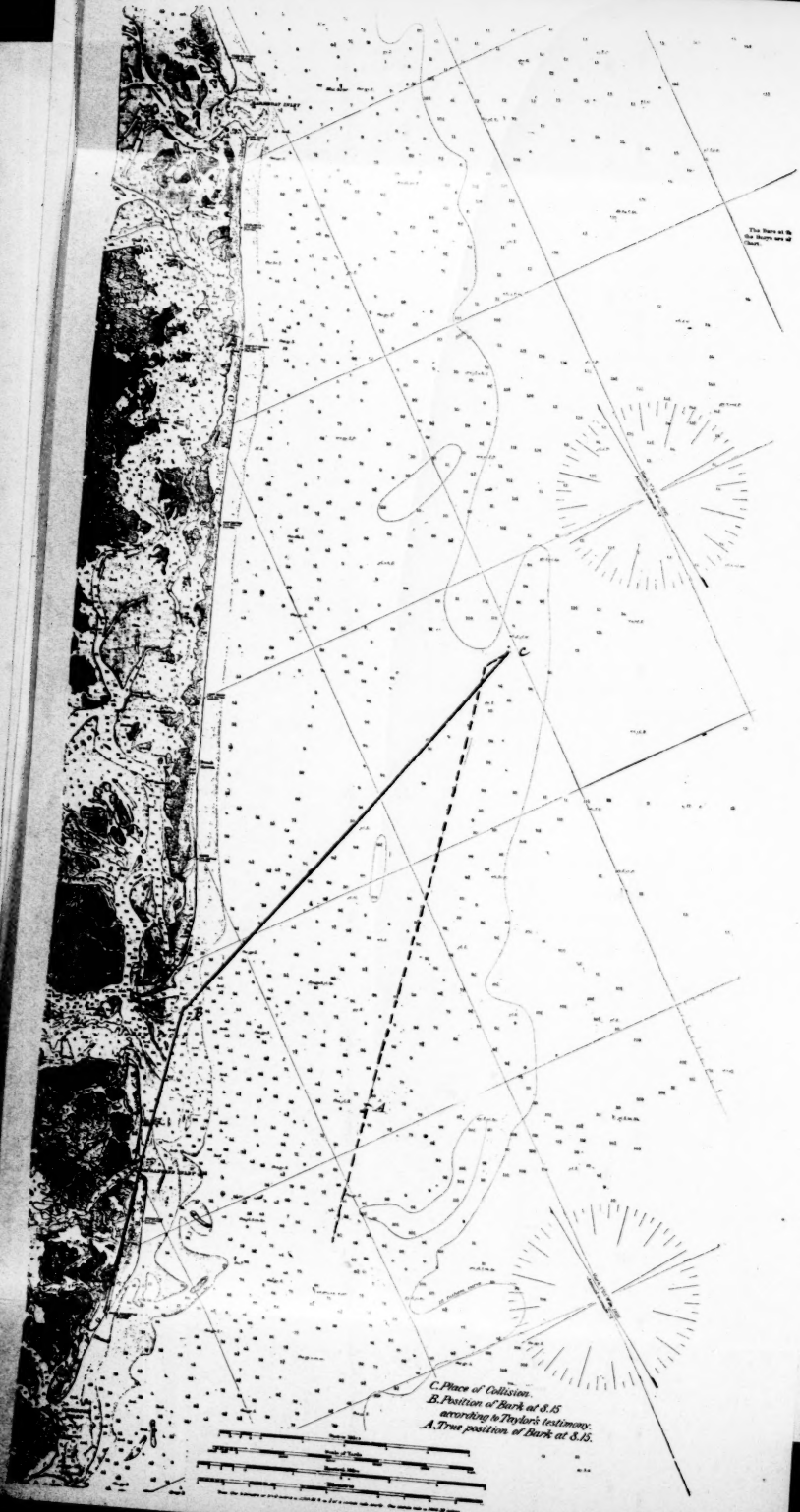
It alleged that the bark's course before she changed was about Northeast or N. E. by N. and that her course at the collision was about East. The point which was contested on the trial was *only as to the course of the bark before she changed.* The libellants raised no question as to the heading of the bark at the collision, but insisted that her course before she changed was East by north ½ north, and that her course at the collision was about East.

b. The trial in the District Court was had on that issue. The mate of the bark testified squarely in support of the allegations of the libel. The owners of the steamer unhesitatingly took the ground that the mate's story was false, not an error but a fabrication.

His story was that up to 8.15 P. M. of the day of collision (2h. 35m. before the collision) the bark had been sailing N. E., that at that time by the captain's orders he put her on the course of E. by N. ½ N., and that such was thereafter her course until the order to port.

c. The District Judge found that that story was a fabrication. He rejected entirely the mate's story "as to the alleged change of course at 8.15" (fol. 46, 47, 48), and found that the N. E. course of the bark (which was nearly the regular course for a vessel bound up the beach) was continued till the bark's helm was ported after the whistle of the steamer was heard.

It is not necessary for me here to do more than to refer this Court to the reasons given by the District Judge for this conclusion (see his opinion, fol. 42 to 47), and to the concurrence of the Circuit


C
B
A
C. Place of Collision.
B. Position of Bark at 8.15
according to Taylor's testimony.
A. True position of Bark at 8.15.

Judge in the same view (fol 190). I have only supplemented it by the following diagram on a chart of the coast on which the course of the bark, as it would have been according to the mate's fabricated story, and her course as it actually was, are shown.

d. As there was no dispute about the heading of the bark at the collision, viz., that it was East or possibly East ½ north, it was thus demonstrated that the change of the bark's course was 3½ to 4 points before the collision and the District Judge said "as this change of course of 3 to 4 points was too great and was commenced too early and too far off to be regarded as a change *in extremis*, and as this change of course evidently contributed to the collision, the bark must also be held chargeable with fault (fol. 49).

The Circuit Judge in his opinion adopted the views of the District Judge and reached the same conclusion as to the course of the bark and the credibility of her mate. He says (fol. 190): "The general course of the bark after 8 o'clock in the evening may be *assumed to have been about N. E. or N. E. ½ N.* This was the conclusion reached by the District Judge, upon considerations which are very convincingly stated in his opinion. *It may be conceded that her mate*, who is the only witness who attempts to give her course by the compass, *is not entitled to any credit.*"

e. An effort was made on behalf of the bark, in the Circuit Court by a change of her pleadings, to relieve her case of this discredit. The allegation was there made, *nearly 8 years after the collision*, of a belief on the part of her agent in New York that there was a deviation of two points in the bark's compass, so that she appeared by her compass to be heading E. by N. ½ N. when she was really heading N. E. ½ E. (fol. 18), thus laying the ground for the argument that the evidence of the mate of the bark as to her course was an error only, and not a fabrication. It apparently was not noticed by the person who drew the

amended pleading, or by the agent who verified it, that such an error in the compass would have made the bark heading until 8.15 of the day of collision N. instead of N. E. as the mate had sworn (fol. 85), which would have been a heading right on the Jersey coast, the line of which there is nearly N. E. and S. W.

But no time need be spent on this matter, because the Circuit Judge made no such finding, although specially requested by the libellants so to find (Fifth request, fol. 160), but found that the course of the bark was about N. E. (as the steamer had alleged it to be) and held that the mate of the bark "is *not entitled to any credit.*"

f. On the point in issue, which was most severely contested in the District Court, viz., the course of the bark before she ported, the District Court found in favor of the steamer and against the bark, and discredited the evidence of the mate of the bark. The Circuit Judge decided in the same way. The District Judge held, that on this finding of fact the bark, inasmuch as she changed her course three or four points, was in fault.

The Circuit Judge agreed that such a change would be a fault.

FOURTH POINT.

Now, after this history of the proceedings in the case, I repeat that, if the Circuit Judge intended to find that the bark at the time of the collision was heading N. E. by E., or E. N. E., so that her change of course was only one or two points, such a finding was a disregard of the pleadings and all the evidence on that point.

a. The pleadings.

The libel alleged that the bark "was heading east by north," and that the order to port her helm "did not alter the course of the bark more than a point, and in a direction away from the said approaching steamer" (fol. 2).

The answer alleged that the bark at the time of the collision "was heading about east."

This was a substantial agreement on the pleadings as to the heading of the bark at the collision.

b. The evidence.

The District Judge in his opinion says, "At the time of the collision the bark, *as all the witnesses agree*, was heading about E. or E. by N." (fol. 42).

This is strictly accurate.

Brown (wheelsman of bark) says the man who was at the wheel before he took it gave him the course "east by north ½ north," and that the bark "was about a point from course" (fol. 42) at the collision; that he "*looked at the compass* at the time the steamer struck."

Taylor (mate of the bark) testified that at about a quarter past 8 P. M. he "hauled up E. by N. ½ N." (fol. 86), and that he told the man at the wheel to port and "that was done" (fol. 87).

Baar (wheelsman of the steamer) says, "At the time of the collision she (the bark) was about east by north" (fol. 109).

Johnson (second mate of steamer) says, "The bark was heading when we struck her about east by north half north" (fol. 137).

There was no other evidence on this point.

c. It is proper to consider the opinion filed by the Circuit Judge upon this point.

1. He says, "If it could be demonstrated that at the time of the collision the bark was headed about east and that her course previous to the change was N. E., the argument for the steamer would be convincing."

But his finding is that her course previous to the change was N. E. (In his opinion he says, "The general course of the bark after 8 o'clock in the evening may be assumed to have been about N. E. or N. E. ½ N." (fol. 190).) Now the pleadings and the evidence concurred that her course at the collision was "about east." Unless therefore the Judge was right in disregarding the pleadings and all the evidence on this point, as to the bark's course at the collision, the argument for the steamer was "convincing."

2. But the Judge adds, "This cannot be demonstrated unless the testimony of the helmsman of the steamer, who gives the course on which the steamer was headed when the bark's change of course took place and also when the collision took place, is accepted as correct."

This language of the Judge may mean either of two things: (1) "the testimony of the helmsman of the steamer" *as to the heading of the bark;* or (2) "the testimony of the helmsman of the steamer *as to the heading of the steamer.*"

If the language had the first meaning it was utterly erroneous. The heading of the bark at the collision was fixed by the *pleadings and the evidence of the bark's witnesses*, as well as by the concurring evidence of the steamer's witnesses.

But let us suppose that the Judge's language had

the second meaning. It is in this case equally erroneous; for the finding of the heading of the *bark* at the collision was not dependent on the then heading of the *steamer* or the evidence of her wheelsman as to such heading.

That finding depends upon the allegations of the pleadings and the evidence of the witnesses *as to the bark's course;* and these, as I have shown, all concur in stating her course at the collision to have been about East or East ½ north. As the District Judge said (fol. 42):—"At the time of the collision, the bark, *as all the witnesses agree*, was heading about E. or E. by N. or about four points to the Eastward of the usual course of vessels bound for New York."

The course of the bark before she changed being found to have been Northeast, and her course at the collision being alleged and proved to be about East, then according to the language of the Circuit Judge "*the argument for the steamer is convincing.*"

d. I have said that the evidence of the wheelsman of the steamer as to her heading at the time of the collision does not prove the heading of the bark at the time.

I have also said that the pleadings and the evidence agreed in showing that the heading of the bark at that time was about East, and that there was no evidence to contradict this. Looking, however, at the opinion of the Circuit Judge, we find that he seems (fol. 190) to have considered the evidence of Haggerty, the diver, (fol. 153) as having a bearing on this point. His opinion on this point shows a remarkable blunder, which I do not pretend to account for.

1. This evidence of Haggerty, as will be seen, was not offered as having any bearing on the question of the heading of the bark at the collision. There was no issue as to that heading, at the time it was offered. It was understood by every one to have been East or East ½ North.

And Haggerty was offered as a witness "*upon the*

condition of the bark after the injury" (fol. 77). To this offer the claimants did not object, and the witness was examined. To draw from that evidence any conclusion as to the heading of the bark at the time she received the injury was an error of law, not only, but it was not fair. The evidence should be confined to the question on which it was offered.

2. The statement which Haggerty made, that "*to the best of my judgment now* the bark, as she lay on the bottom, lay headed up the beach, about northward and eastward—about north-north-east" (fol. 154), is not entitled to the slightest consideration in reference to the course of the bark at the time of the collision, and its consideration as such was an error duly excepted to (fol. 200).

Haggerty dived down to the bark on the 10th of July, 1879, twelve days after the collision (fol. 153). His evidence was given on the 27th of April, 1882, nearly three years afterward.

He does not pretend to have made any investigation on this point of the heading of the vessel at the time. He did not pretend to have any memory on the point when he was examined.

He was particular to say that he was speaking, not from memory, but "to the best of my *judgment now*" (fol. 154).

His "judgment" given three years afterwards, as to the heading of the bark as she lay on the bottom, was not evidence in any way as to the heading of the bark before she sunk. There is not a particle of proof, nor could there be, that her heading was not changed by the force of the collision and by her sinking. In fact it is impossible that the heading of the bark, struck, as she was, aft of mid-ships on the port side by the steamer (especially if the headway of the steamer was not checked as the Circuit Judge found it was not) should not have been made very different from what it was before the blow.

3. The Circuit Judge himself appears to concede

that this evidence is of no value, and yet he bases his decision upon it. He says (fol. 190): "This fact alone might not be enough to authorize the conclusion that she was heading N. N. E. at the time of the collision, but it is entitled to consideration as measurably supporting *that theory, and is more persuasive in fixing her heading approximately* than are the conjectural opinions of the witnesses, formed in the excitement and confusion of the moment, who think she was headed east. *If she was headed about N. N. E. when she was struck by the steamer she did not change her course more than a point and a half under her port helm.*"

It is quite remarkable that the Circuit Judge should have fallen into such an error as is here displayed. He has here mistaken the effect of a *starboard* helm for that of a *port* helm. He had found that the heading of the bark before she changed was N. E. To change her heading from N. E. to N. N. E. would require not a *port* helm but a *starboard* helm, and the change of course of the vessel under a *port* helm instead of making her heading north of northeast, as the Circuit Judge seems to think, would make her heading east of northeast.

The judge was undoubtedly correct in saying that that fact "might not be enough to authorize the conclusion that she was headed N. N. E. at the time of the collision"—clearly it was not enough.

It seems of little use to consider whether that fact (if it were a fact) "is entitled to consideration as measurably *supporting that theory*," inasmuch as there never was any such theory to be supported.

And that the Judge fell into an extraordinary error in saying that that fact is "persuasive in fixing her heading approximately" is plain from the fact that he himself instead of finding that her heading at the collision was N. N. E. found that her previous course had been N. E. and that she was seen to be heading eastward.

4. My statement that there is no evidence that

the heading of the bark was other than what the pleadings alleged remains unaffected.

A blunder of the Judge in thinking that a *port* wheel would change a vessel's heading from N. E. to N. N. E. is not to be dignified by speaking of it as *evidence.*

FIFTH POINT.

The disregard of the pleadings by the Circuit Judge was an error and contrary to the well settled rule of admiralty proceeding.

It has always been held that the party can only recover *secundum allegata et probata.* The authorities on this point are numerous. One of the cases most applicable is the case of the *Ann* (Lushington, page 55). This was a case brought by the owners of the steamship *Magnet* against the schooner *Ann* for a collision. The owners of the *Magnet* alleged that the collision was caused by the improper starboarding of the *Ann.* The admiralty judge decided that the *Magnet* was solely to blame and dismissed the action, and the owners of the *Magnet* appealed. The appellate court held in its decision that, although the *Magnet* was not to blame, yet that the *Ann* did not starboard her helm at all, but that the collision was caused by the *Ann's* keeping her course without alteration till the last moment, when she ported. The Court used the following language: "Now it is a rule, and a most important rule, to be observed in all courts, that a party complaining of an injury, and suing for redress, must recover only *secundum allegata et probata.* There is no hardship or injustice in adhering strictly to this rule against the complainant, for he knows the nature of the wrong for which he seeks a remedy, and can easily state it with precision and accuracy. But great inconvenience

would follow to the opposite party unless this strictness was required, because he might constantly be exposed to the disadvantage of having prepared himself to meet one state of facts, and of finding himself suddenly and unexpectedly confronted by another totally different. The great object of all courts where trials of fact take place ought to be to bring the parties to a distinct agreement as to what is in contest between them, and this object would be entirely frustrated if it were competent to a party to place his right to redress on one ground, and then to abandon it at the trial for another, although the latter ground would originally have given him a right to recover against the other party. Their lordships have, in a recent case before them, held that parties are bound by the statements which they make in their pleadings in the Court of Admiralty. In the case of the *Tecla Carmen* and the *North America*, (Swabey, p. 358), the court below had found that both parties were to blame, and had given sentence accordingly. Their lordships were strongly inclined to think that the *North America* was alone in fault, but upon a different state of facts than that which had been alleged on behalf of the *Tecla Carmen*, and they therefore affirmed the sentence, being of opinion 'that it would not be consistent with the safe administration of justice to alter the judgment upon grounds quite inconsistent with the case made by the appellant, both inhis allegations, and in his evidence and at the bar.' The present case will furnish an additional example of the necessity of correctness and accuracy of statement in the pleadings in the Court of Admiralty."

In the case of *The Oregon* (Newbury, page 508), the Court said: "The case as presented by the pleadings, is doubtless the only one to which the evidence has been directed and the only one upon which the court can be called upon to decide."

In the case of *The Rhode Island* (Olcott, p. 511), Judge Betts said: "The cardinal principle of

pleading in admiralty proceedings is that proofs cannot cover the party further than they are in correspondence with the allegations of his pleadings, and that the decree of the court must be in concurrence with the pleadings and proofs. (Citing authorities). Whatever may be the case, then, *upon the evidence, on the one side or on the other, the judgment of the court must be restrained by the allegations* in issue, and if they are insufficient to maintain the right of either party as established by the proofs, or the evidence stand in conflict, an amendment must be obtained or the court will be compelled to pronounce its decision *secundum allegata et probata*, disregarding all evidence not brought within the fair and reasonable scope of the pleadings."

This rule was sustained by this court in the case of McKinley *vs.* Morrish (21 Howard, 346), and has always remained the settled rule in admiralty courts.

The rule above laid down applies with especial force to this case. When the case was tried there was a concurrence of both parties upon the allegation of the libel as to the heading of the bark. And this rule is to be applied with strictness against the *libellant.* An effort was made in the Circuit Court to change the case of the original libel by an amendment. The Circuit Court decided that the proposed change had no sufficient ground. This left the case one in which the respondents had the right to claim that the case must be disposed of according to the allegations of the libel. But the Circuit Judge in disposing of it, has placed his decision upon a ground not alleged in the original libel nor made out on the amended libel, and as to which there is no evidence, and which operated as a complete surprise upon the respondents. They had prepared themselves to meet a state of facts as to which both parties agreed. On that state of facts both courts decided in their favor. And yet a decision is made against them in the Circuit Court

on another ground not alleged and as to which there is absolutely no evidence to sustain it.

SIXTH POINT.

Summing up this branch of the case, the errors of the Circuit Judge are manifest.

On the pleadings in the District Court the bark's heading at the time of collision was averred by the libellants to be about a point to the eastward of E. by N. ½ N. By the respondents it was alleged that the bark was heading about east. On those pleadings there was a substantial agreement between the parties as to such heading.

On the pleadings in the Circuit Court, the libellants averred that the heading of the bark at the collision *appeared to be by her compass*, about a point to the eastward of E. by N. ½ N., which is the same allegation as that in the District Court, in substance.

But they also averred a further fact; that there was a deviation in the compasses of the bark, so that her compass was not accurate. This allegation the claimants of the steamer denied. The libellants requested the Circuit Judge to find the fact of such deviation of the bark's compass (fol. 160). The Circuit Judge has found no such deviation; nor has he alluded in his opinion to any such fact as existing. His refusal to find that fact leaves the allegation in the libel in the Circuit Court as to the heading of the bark at the collision according to her compass, just as it was in the libel in the District Court, and furnishes no ground for claiming that the heading of the bark at that time was otherwise than as stated by her compass.

On this condition of the pleadings, the claimants are entitled to insist upon it as a fact alleged by

both parties that the heading of the bark at the time of the collision was about a point east of E. by N. ½ N., or was about E. or E. ½ N.

They were entitled to have the case disposed of on that basis. With that basis we have the Circuit Judge himself saying that "the argument for the steamer is convincing."

And the Circuit Judge furnishes no other ground for his not accepting that argument except a conclusion drawn by him (contrary to pleadings and evidence), only because he mistook the effect of a starboard helm for that of a port helm.

No clearer case of manifest errors was ever presented to an appellate court.

SEVENTH POINT.

The story of the mate of the bark was a deliberate fabrication. It is according to justice that this Court should dismiss the libel which that fabrication was put forward to sustain.

a. The purpose of the mate in fabricating his story is manifest. He knew that he had made a fault in his navigation by changing his course and throwing his vessel across the bows of the steamer which would have otherwise cleared her.

He therefore saw that he must *belittle that change of course.*

b. Now the true course of the vessel was doubtless N. E. by N. ½ N. or N. E. by N. ¼ N. (The course down the beach is given in the sailing directions used by British vessels as S. S. W. ¾ W. or S. S. W. ½ W., and it is said "these directions reversed will answer for sailing northward," fols. 151, 152.) No reason can be suggested for any other than the usual course. The bark had been sailing

up the coast having the land in sight from three o'clock till dark (fol. 98), and at 8 P. M. the light-houses were in sight which told the captain just where he was.

A slight change by the mate in giving his evidence —the mere dropping of the first "North" would be sufficient for his purpose. Stating the bark's course as E. by N. ½ N. instead of N. E. by N. ½ N. would do the business and give her a change of course of only a point and a half before the collision instead of four points and a half. And this was what he determined to do.

c. But this falsehood, as usual, involved others. The vessel was sailing with the wind a little on her starboard quarter, so nearly astern that the mate said "the starboard side was the weather side, *if there was any weather side* about it" (fol. 86). To change the heading of the bark involved a change in the direction of the wind. And so Taylor swore that the wind was "about W. S. W. perhaps a little southerly" (fol. 85).

Our national system of coast survey furnished us with the means of contradicting Taylor on this point, for the wind from Barnegat to Cape May was south, as was shown by the records (fols. 125 and 130) sustained by the log of the steamer *Old Dominion* (fol. 128), which was in the immediate neighborhood of the collision.

And again this change in the heading of the bark necessitated a falsification of the bearing of the steamer's whistle. The steamer going down the coast and the bark coming up must each have heard the other's signal nearly ahead. So the steamer's witnesses testified that they heard the horn. And so the bark's lookout testified that he heard the whistle of the steamer. (See Diagram No. 2, at p. 42.)

But Taylor swore, in order to fit in with his other falsehoods, that the whistle of the steamer was heard "*about the port beam*" (fol. 86, 87).

The Circuit Judge in his opinion says (fol. 187),

that the witnesses for the bark agreed that the whistle of the steamer seemed to indicate that her bearing was "*abeam on the bark's port bow*" (!!) whatever bearing that may be.

d. This fabrication was cunning. It might have been successful but for two things.

Taylor was not able to make his testimony of the lights which they had seen on the shore agree with it. Those lights told where his vessel was two hours before the collision, and showed that his evidence as to her subsequent course was false. (See opinion of Judge Brown, fol. 42–45.)

And Taylor did not calculate upon our being able to fix the place of the collision by the place of the wreck (fol. 157).

This placing of the wreck showed that Taylor's evidence as to her course was impossible.

e. We have then a fabricated story, put forward deliberately as the foundation of the libellants' case.

And both the District and Circuit Courts have concurred in holding that it was fabricated and Taylor was not entitled to credit.

How should this Court treat such a case?

1. It should apply to the witness the maxim of *falsus in uno, falsus in omnibus.*

This witness has been found by two courts to have been unworthy of credit. The fact in issue has been by both courts found against his evidence.

"And Courts of Justice, under such circumstances, are *bound, upon principles of law and morality and justice,* to apply the maxim *falsus in uno, falsus in omnibus.*"

The Santissima Trinidad, 7 Wheat.

2. This matter, as to which Taylor fabricated his evidence, was the foundation of the libellants' right to recover.

Shall a Court of Equity, when it finds that that foundation is a foundation of falsehood, treat the case in the same way as if its foundation was truth? I trust this Court will do otherwise.

In the case of the *Tillie*, where a log had been put in evidence for the ship which the libellants attacked as fabricated, the Court held that it had been fabricated, and said, "If possible, it ought never to happen that a case sought to be supported by a fabricated log-book should succeed; and while charges of this kind are not to be listened to unless based on strong evidence, if they are supported by testimony and remain unanswered on the evidence *they compel an adverse decree*" (7 Ben., 283).

See *The Soglasie* (1 Spinks, 107), where a similar rule was applied in a prize case.

3. It ought to follow that the libellants' case, having been placed on a foundation of falsehood, and having been sought to be sustained by the evidence of a witness whom the Court has discredited, should be expelled from court.

"It should never happen that a case sought to be supported" by the fabrication of this mate, Taylor, whether in his log-book or on the witness stand, "should succeed."

EIGHTH POINT.

On the findings of the Circuit Judge, he was in error in refusing to find that the action of the steamer did not contribute to the collision, but that it was solely due to the bark's change of course. This proposition is involved in the exception to the Circuit Judge's third conclusion of law, and the exceptions to his refusal to find either the 4th, 11th, 15th or 16th conclusions of law, which the claimants proposed.

a. The Judge found that the steamer was going at a speed of 11 knots an hour which is 1,100 feet a minute.

He found that the bark was going at a speed of 4 knots an hour which is 400 feet a minute.

He found that the foghorn of the bark was heard about two minutes before the collision and that the steamer's engines were not reversed till she was within 150 feet of the bark.

He found that the wheel of the steamer was put hard-a-starboard immediately on hearing the foghorn and that she had run under that starboard helm at least a minute before the bark was seen.

He found that the course of the bark was "eastward across the steamer's bow," *i. e.*, that she was, when she was seen, on the steamer's starboard bow. Giving her a length of only 100 feet and saying that she was $\frac{2}{3}$ by the steamer's bow at the collision, she would be at this instant 400 feet less 66, or 333 feet off from the line of the steamer and on her starboard bow.

b. Now if to this be added the finding that the steamer's course had been changed during that minute three points to the eastward, it follows that as her course, before she changed, was found to have been S. by W. $\frac{1}{2}$ W., her course at that minute would have been S. by E. $\frac{1}{2}$ E.

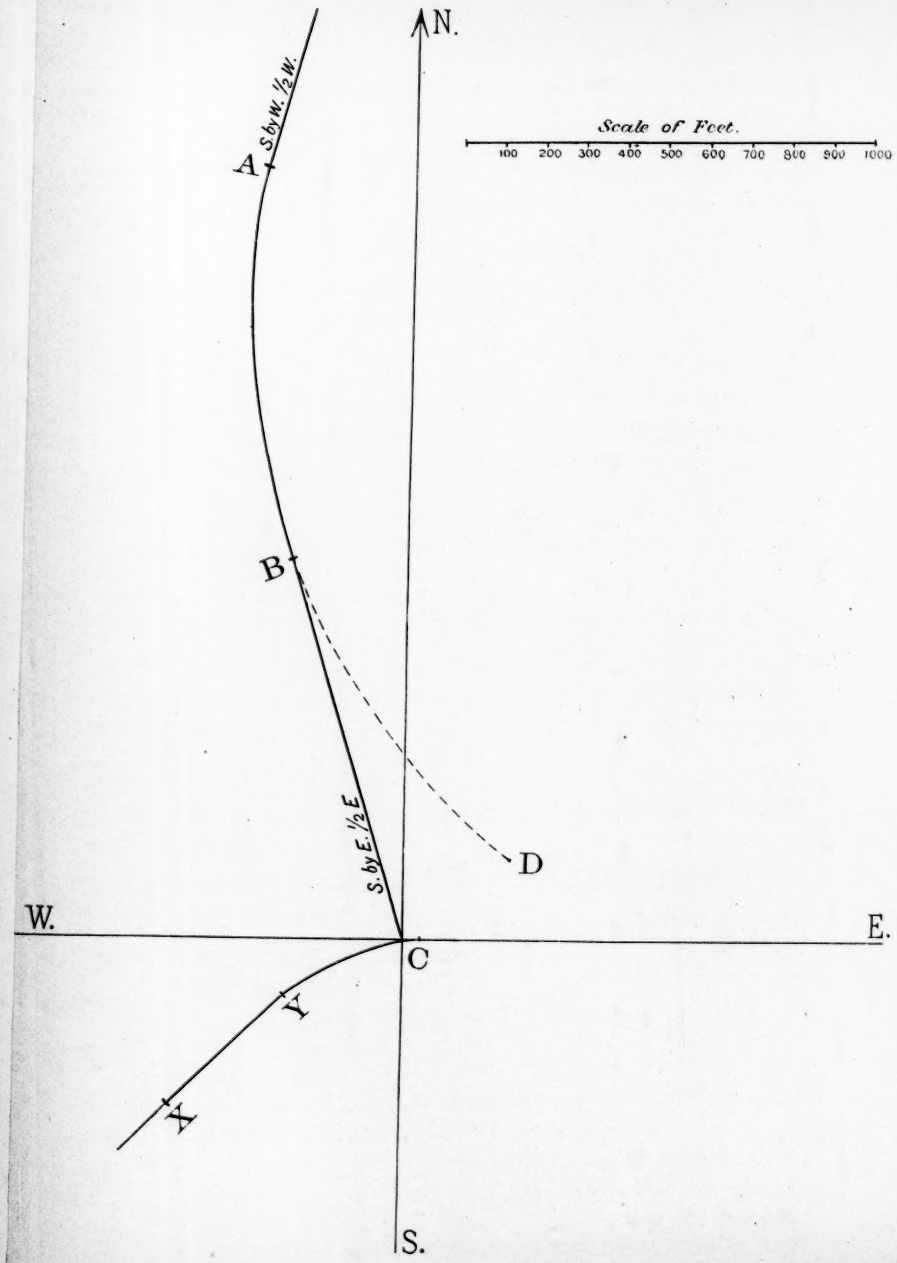
And the bark's course, but for her change, would have been then, and would have continued to be, N. E.

The Judge has not put in his *findings* anything as to the effect, on the steamer's heading, of her ported wheel and reversed engine, but he says in his opinion that she "could not have been influenced materially to starboard."

A change of three points in running a distance of 1,000 feet would require a distance of 10,666 feet run to complete the circle of 32 points.

A circle of 10,666 feet has about 3,400 feet of diameter and 1,700 feet of radius.

c. Laying down these various findings on the annexed diagram and we should have the steamer at A, heading S. by W. $\frac{1}{2}$ W., hearing the fog horn of the bark. We should have her then, under her


N.
Scale of Feet.
100 200 300 400 500 600 700 800 900 1000
A
S. by W. ½ W.
B
S. by E. ½ E.
D
W.
E.
C
Y
X
S.

starboard wheel, swinging on a circle of about 1700 feet radius, until at the end of a minute she was at B and heading S. by E. ½ E., having swung three points. And, as the Judge says that she "could not have been influenced materially to starboard" afterward, we should have her continuing on that heading of S. by E. ½ E. till the collision at C.

We should have the bark at a distance of about 800 feet from the collision at the time when the steamer was at A, and 400 feet from it when the steamer was at B.

Her heading then, and her course from that time to the collision at C, would depend upon the time when she began to change her course and the extent of the change.

My argument on this point is not affected by any variation in either of these elements. But I have assumed on the diagram that when the steamer was at A the bark was at X and heading N. E., and that when the steamer was at B the bark was at Y, and on the same heading.

Any possible variation in the bark's course or position consistent with her being still on the steamer's starboard could not affect the question. For if the steamer's swing to the eastward had not been stopped by the discovery of the bark's change of course, the steamer, continuing on the circle, would have been at D instead of C, and the bark could by no possibility, at her speed of four knots an hour, or 400 feet a minute, have reached the steamer.

It is therefore a mathematical demonstration, from the premises furnished by the findings themselves, that, if the swing of the steamer under her starboard helm had not been stopped, as it was, by the bark's change of course, the measure which the steamer had adopted to avoid the collision would have been successful.

d. The case then on the Circuit Judge's findings is one in which the steamer, whose duty it was to

avoid the bark, adopted a measure which would have avoided her, if it had not been thwarted by a wrongful maneuver on the part of the bark.

And in such a case it is the vessel which thwarts and not the vessel which is thwarted, which is responsible for the collision.

We, therefore, were entitled to the findings of law which we requested.

NINTH POINT.

The Circuit Judge erred in his first conclusion of law.

He held that the steamer was guilty of fault in violating the 21st Rule.

He gives three specifications of it:

1. She did not slacken her speed when she heard the fog signals of the bark.

2. She did not go at a moderate speed in a fog.

3. She changed her course and kept on at great speed, after she heard the bark's fog horn, before seeing her.

I consider these three faults in order.

a. The position of these vessels is to be remembered. The line of the Jersey coast is well known, and the course of vessels sailing up and down it is as well known and as easily determined as in a public street.

The wind was a perfectly fair one for a vessel coming up the beach. The mate of the steamer, therefore, had the right to judge, as he did, that the bark was coming on a course of about N. E. He did so judge, and the Court has found as a fact that she was.

Now, whether he was required by Rule 21 to slacken speed, depends upon whether he was bound to have judged at that moment that he was "ap-

proaching another vessel so as to involve risk of collision."

The Circuit Judge says (fol. 184): "That she was approaching another vessel so as to involve risk of collision, from the time those in charge heard the first fog signal of the bark, *is sufficiently manifest by their conduct in putting her wheel to starboard and hard a-starboard instantaneously upon hearing the fog horn.*"

This is holding that whenever a steam vessel approaches another, if she changes her course to avoid the other, she must then slacken her speed.

I apprehend that such is not the law. Such a change of her course may show that she is approaching another vessel, but it does not show that she is approaching her "*so as to involve risk of collision.*"

If at such a time she makes such a change of her course as would take her clear of the other vessel, she is not bound to slacken her speed.

This was distinctly held in the case of the *Earl of Elgin* and the *Jesmond* (1 Asp. [N. S.], p. 152), and repeated in the case of the *Rhondda*, (5 Id., p. 119). If, after she has changed her course, her change of course is thwarted by a wrongful change of course of the other vessel, that does not make her in fault for not having slackened her speed. It must be borne in mind that changing the course and slowing the speed are *contradictory* maneuvers. The more the speed is lessened, the less is the change of course.

Now the mate of the steamer, when he heard the fog horn, was compelled to choose whether he would slacken his speed or change his course. He chose to change his course; and on the findings of the Circuit Judge that change of course was abundant to carry her clear of the approaching vessel. (See *Ante*, Eighth Point.)

He was not therefore in fault for not then slackening speed, because his change of course was afterward thwarted by the wrongful change of course of the bark.

b. The Circuit Judge holds that "moderate speed in a fog" is such a speed as will enable a vessel, by reversing her engines "to avoid collision within the distance at which, in the condition of the fog, another vessel could be *seen.*"

But I submit that if the speed of the steamer was such that she could have been stopped *after the presence and approach of the bark were known*, and not merely after the bark was actually *seen*, it was moderate.

> In the *Europa* (14 Jur., 627), the court said: "No steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she *sees danger to be possible.*"
>
> In the *Edam* (21 F. R., 669), the court says that a certain speed was moderate because "it enabled the *L.* to come to a full stop long before sailing over her share of the distance that separated the two steamers *when their whistles were first heard.*"
>
> Other cases to the same effect could be cited.

Now the Circuit Judge finds that the fog horn was heard two minutes before the collision, and that the speed of the steamer was 11 knots or 1,100 feet a minute, while that of the bark was 4 knots or 400 feet a minute, so that the steamer was aware of the presence of the bark when the vessels were about 2,500 or 3,000 feet apart. The Judge's finding is "that the steamer's headway could not be stopped within an eighth of a mile" which is 750 feet. In his opinion he quotes the opinion of the committee of the British Association that the distance in which a steamer can be stopped "generally lies between 4 and 6 times the ship's length," which, in this case, as the steamer was 242 feet long, would be between 968 and 1,452 feet.

The speed of the steamer was therefore moderate. Moderate speed must be a variable thing according to the density of the fog. In this case there was

"not much of a fog" (evidence of Capt. Dearborn quoted in opinion, fol. 185).

And beyond question this steamer was so running that, if the mate had deemed it safer to avoid the collision by stopping and reversing, he could have brought his vessel to a standstill before reaching the bark.

The speed at which his vessel was running at the time he heard the fog horn was therefore "moderate," and moreover it had no relation to the collision at all.

c. The mate, on hearing the fog horn, judged it prudent to avoid the other vessel by changing his course.

"I do not think the cases cited support the proposition that there is any such absolute hard and fast rule as that a vessel, hearing only the indication of a single whistle from the other vessel, is never justified if she does maneuver, and must always be held in fault if she does maneuver. * * * * In each particular case you must look to see what the circumstances were which justified the maneuver executed or which prevented that maneuver from being a wrong maneuver."

The *Vindomora, 6 Asp., p. 570.*

Now, under the circumstances of this case, with a wind from the south, and taking in view the distance from the Jersey coast and its direction, the mate was perfectly justified in judging of the course of the bark, as much so as a teamster is justified, in a country road, on hearing a call from an approaching team ahead, *and he made no mistake in his judgment of it.*

The two Courts have found that the course of the bark, till she changed, was just as he judged.

The measure which he adopted, therefore, was one which was based on premises which were accurate, and which would have been successful if it had not been thwarted by the wrongful change of the course of the bark.

How can a measure, based on a judgment which was accurate, and which measure would have insured safety if it had not been for the wrongful change of course of the bark, be held to have been faulty navigation?

And the keeping on at speed was a part of the same maneuver. If he had under the then circumstances slowed his speed, that would have been an action inconsistent with his starboarding and justly to be condemned.

If he was right in starboarding, as I have shown that he was, he was then right in keeping on at speed, for in that way he was sure to run less risk of collision if the bark kept her course.

And he had the right to assume that the bark would keep her course and to act on that assumption.

And, as I have shown, his action would have avoided collision, but for the wrongful change of course of the bark.

See The Blue Jacket, 144 U.S. 371

TENTH POINT.

But even if the steamer be held to have been in fault for not going at a moderate speed, she was not chargable with the damages caused by the collision because the collision would have been avoided, if there had been ordinary care on the part of the bark.

a. We have shown above, that with the speed of the steamer and her change of course, as found by the Circuit Judge, she would have cleared the bark but for the bark's change of course.

b. The question upon whom the loss should fall where there have been faults on both sides, is discussed by Marsden, in his book on Collision, and after discussing the authorities he sums them up as follows: (p. 23).

"(1) A ship, A may recover full damages against another, B, though she (A) has been guilty of negligence contributing to the collision, provided that B could, with ordinary care exerted up to the moment of the collision, have avoided it; (2) A can recover nothing, though B was guilty of negligence contributing to the collision, if A, by ordinary care exerted up to the moment of the collision, could have avoided it; (3) A may recover half her loss though she has been guilty of negligence contributing to the collision and rendering the collision unavoidable except by extraordinary care on B's part, if B has been guilty of negligence contributing to the collision and rendering it unavoidable except by extraordinary care on A's part; and (4) in the last case B may also recover half her loss."

c. In this case let us call the steamer A and the bark B.

Now the keeping of her course by B was only "ordinary care". Therefore this is a case in which though A (the steamer) were held to have been guilty of negligence contributing to the collision (i. e., was not going at moderate speed) yet B (the bark) could, *with ordinary care exerted up to the moment of the collision* (i. e., by keeping her course as she was bound to do) have avoided it.

This is the first case which Marsden puts, and in this case the steamer is not chargeable with the loss.

A great English case on this point was the case of The *Margaret*, or *Cayzer* vs. *The Carron Co.*, 5 Asp., 371. The collision occurred in the Thames between the *Margaret* and the *Clan Sinclair*. There was a rule governing the navigation of the Thames, that before rounding Blackwall Point a steam vessel should "ease her engines." The *Clan Sinclair* did not do so. The *Margaret* was navigated wrongly, and undertook to pass on the wrong side, and a collision occurred .The Admiralty Court held that the owners of the *Clan Sinclair* were entitled to a full recovery. The Court of

Appeal reversed, and held that, by reason of the failure of the *Clan Sinclair* to obey that rule, the damages must be divided. The House of Lords reversed the Court of Appeal and sustained the Admiralty Judge, holding that notwithstanding the fact that the *Clan Sinclair* had not eased her engines as required by the regulation, and notwithstanding the fact that, if she had done so, she would not have been where she was, and that the collision was owing to her being where she was, still, as the "consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*, but instead of exhibiting ordinary care and prudence, those in charge of that vessel adopted a reckless course of navigation, the *Margaret* must bear the whole loss.

The present case is a parallel one. The failure to ease the engines of the *Clan Sinclair*, which was required by the regulation, was analogous to the failure of the *City of New York* to reduce her speed in the fog; The collision was held due to the faulty navigation of the *Margaret*. Here it should be held due to the wrongful navigation of the bark, and she should bear all the loss.

This case is one to which the language of this Court in the case of *The Potomac* (8 Wallace, 592) is eminently applicable.

"It is unnecessary to restate the rules of navigation obligatory upon vessels in the predicament these were in on the night in question. They were elaborately presented by this court in the case of The Steamship Co. *vs.* Rumball (21 How., 372), and were recently affirmed in the case of The Carroll (8 Wall., 302). One of these rules requires the steamer to keep out of the way of the sailing vessel, but to enable her to do this effectively, the law imposes the corresponding obligation on the sailing vessel to keep her course. If, therefore, the steamer adopts *proper measures of precaution to avoid the collision which would have been effective if the schooner had not changed her course*, she is

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NOV 16 1878
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

JOHN E. ALEXANDRE ET AL., CLAIMANTS OF THE STEAMSHIP CITY OF NEW YORK,

Appellants,

vs.

JOHN MACHAN ET AL., OWNERS OF THE BRITISH BARK HELEN,

Appellees.

BRIEF FOR THE BARK HELEN.

GEO. A. BLACK,
Of Counsel,
71 Wall Street, N. Y.

44 PINE STREET.

C. G. BURGOYNE, Cor. Walker and Centre Sts., N. Y.

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SUPREME COURT OF THE UNITED STATES.

JOHN E. ALEXANDRE ET AL., owners of the steamship "City of New York,"

AGAINST

JOHN MACHAN ET AL., owners of the British bark "Helen."

BRIEF FOR THE BARK "HELEN."

Preliminary Statement.

On June 28th, 1879, at about 10:50 P.M., the British iron bark "Helen," loaded with a cargo of sugar, and bound from Havana to New York, was sunk by a collision with the steamship "City of New York." The captain and five of her crew were drowned (45, *85*). The collision occurred in a dense fog at a point about five and one-quarter miles off the shore of New Jersey, Barnegat Light bearing N. $\frac{1}{8}$ E., distant twelve and one-half miles, and Tucker's Beach Light bearing W. S. W., distant nine and one-half miles (79, *157*). On July 3d, 1879, the owners of the "Helen," for themselves and as carriers of the cargo, and on behalf of the representatives of Capt. Barclay and the survivors of the crew of the bark, filed a libel in the District Court of the United States for the Southern District of New York against the steamship "City of New

York" to recover damages for this collision. On the same day Alexandre and others, owners of the steamship, filed a claim for said steamer, and on the 30th day of October, 1879, answered the libel. The depositions of the survivors of the crew of the "Helen" were taken in July, 1879, and the case was tried in the District Court in April, 1882 (p. 77). The District Court held the case under advisement until March 5th, 1883 (27, *49*), and then filed the opinion which is found at pages 18 to 27, and which is reported in 15 F. R., 624, holding both vessels in fault. On the 20th of November, 1883, an interlocutory decree in accordance with this opinion was entered (p. 14). In the interval an application had been made by libellants to the District Judge for a rehearing on the ground that the bark was an *iron* bark and had a list to starboard; that she had a deviation card on board; that an azimuth had been taken, and that the books of science, which were then presented to the District Judge, showed the effect on the compass of an iron vessel of her *inherent* magnetism and the mistake which the District Judge had fallen into in overlooking that physical fact which had led to misapprehension by him of the testimony given by libellants' witnesses. That application was denied and an order made November 7th, 1883, couched in the following words:

"It is now ordered that the said motion for the re-
"hearing of the case be, and the same hereby is, de-
"nied *on the ground that the libellants herein have a*
"*right of appeal to the Circuit Court wherein the said*
"*matters may be considered and determined without*
"*prejudice, and for that reason only.*"

Brown vs. Piper, 91 U. S., 42, "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the Judge's memory is at fault he may refresh it by resorting to any means for that purpose which he may deem safe and proper.

This extends to *such matters of science* as are involved in the cases brought before him."

On July 2d, 1885, the final decree of the District Court was entered; by it the damages were ascertained, and the amount thereof divided (15). The libellants and the claimants of the steamship each appealed to the Circuit Court (Appeal of Libellants, 31; Appeal of Claimants, 35).

On December 7th, 1886, libellants filed an amended libel in the Circuit Court (7), to which claimants filed exceptions (8), and thereupon the libellants, on the 15th of February, 1887, filed a second amended libel in the Circuit Court (9). The amendments consisted in the allegations (9, *18*) "that the wind at the time *appeared to be* by said bark's compasses W. S. W. Libellants believe that the true direction of the wind was S. W., and that the compasses of the bark indicated it to be W. S. W. for the reasons hereinafter stated. The said bark was heading, *as it appeared* by said compasses, E. by N. $\frac{1}{2}$ N., and libellants believe her true heading was N. E. $\frac{1}{2}$ E., and that the said heading appeared to be E. by N. $\frac{1}{2}$ N. by said bark's compasses for the reasons hereinafter stated."

"That the said bark was an *iron* vessel and had a *list* to starboard, and her compasses were affected by these facts, and she had a *deviation* card on board, by means of which corrections in the readings of said compasses were made, which deviation card was lost with said vessel, and the master being drowned, libellants are unable to more accurately state the said deviation than that it was between one and three points on different courses, and libellants believe that such deviation, on a true N. E. $\frac{1}{2}$ E. course, was two points; so that the course *appeared* by said bark's compasses E. by N. $\frac{1}{2}$ N." (10, *19*).

On February 26th, 1887, claimants answered the amended libel (11). The trial took place in the Circuit Court in October, 1887 (38), and the opinion of the

Circuit Judge (88-97), with his findings of fact, was filed June 26th, 1888. The claimants filed exceptions to these findings and conclusions (97). On the 26th of October, 1888, the Circuit Judge signed the claimants' bill of exceptions. The final decree of the Circuit Court, holding the steamship solely to blame for the collision, was entered October 27th, 1888 (102). Claimants appealed to this Court on December 3d, 1888 (115).

The District Judge found no difficulty in holding the steamship in fault both for the speed at which she was running her engines in the dense fog (19, *38*), and for not stopping at once on hearing the bark's fog horn, and for changing her course in ignorance of the course of the bark (20, *39*).

The Mistake of the District Judge.

The District Judge said: "The question whether the bark was also in fault presents great embarrassment upon the testimony in this case" (21, *41*). This embarrassment arose out the inability of the District Judge to appreciate the testimony of the mate, arising from ignorance of the fact that an allowance was to be made for **"deviation"** in reading the compass of the bark, and of the meaning of the word **"azimuth,"** and from this arises his disbelief of the mate's testimony.

His process of reasoning was as follows:

"Proceeding backwards from the place of collision * * * upon the course alleged by the mate, the bark, at 8:15 P. M., at the rate of four knots per hour, would be upon the beach near Tucker's light house (22, *43*). * * * Tracing still further backward, the course of the vessel accordingly" (*i. e.* on the opposite of a northeast course, viz., southwest) "the bark would have been ashore on the shoals above Absecon light" (23).

Having thus convinced himself that the courses testified to by Taylor, the mate of the bark, were false (and manifestly they were so, if taken literally), the learned District Judge proceeded to *demonstrate* the turpitude of the mate by showing how everything was harmonized by assuming that the course of the bark had been the usual one, say northeast (23, *44*), and how on a northeast course, at 8:15 P. M., she would be "at a point $4\frac{3}{4}$ miles from shore, in nine "fathoms of water, and about $5\frac{1}{2}$ miles distant from "Tucker's lighthouse, which would bear about north-"northwest, while 'Barnegat' would bear north-"northeast $20\frac{1}{2}$ miles distant, and Absecon light "would bear west-southwest about $9\frac{7}{8}$ miles dis-"tant" (23, *44*), and how these lights "also agree pre-"cisely with the position and bearing of the lights "which the mate testifies to observing (23, *44*).

The result expressed in his own words was: "I find "myself unable to credit the statement of the mate" (22, *42*). "The story of the mate as to the course of "the bark previous to the collision must for these "various reasons, therefore, be rejected as wholly in-"credible in itself and wholly irreconcilable with his "testimony and that of others in regard to the "lights" (24, *45*).

"The mate's testimony as to the alleged change of "course at 8:15 P. M. I must, therefore, reject, as I "have said, because it involves the most violent im-"probabilities as to the previous navigation of the "bark, and is wholly irreconcilable with other accred-"ited facts" (25, *47*).

"If the mate had given an account of the bark's "course, which was in the slightest degree credible "and reconcilable with his other testimony and the "other facts in the case, so as to furnish a probable and "consistent story, it would have been adopted without "hesitation" (26).

"But as I feel obliged to discredit the mate's testi-

" mony as to one of the most important facts in the " case, and to remark also his suspicious indefiniteness " and asserted want of knowledge concerning other im- " portant facts in regard to the position of the bark " which he knew shortly before giving his testimony, " and which it is not probable he had forgotten, such " as the result of the **azimuth,** *which he himself* " *computed,* * * * there is no alternative but to " follow the testimony from the steamer" (26, *49*).

Having thus convinced himself that the mate was a *perjurer,* the District Judge found no difficulty in confirming his judgment, and the **"azimuth"** becomes, to his suspicious mind, "confirmation strong as proofs of holy writ."

He says: "The day was clear, an **azimuth** had " been taken, and shortly before 8 P. M. the lead had " been thrown. These circumstances show that the " master must have known his position perfectly" (25, *47*).

The idea of the Judge apparently was that an **"azimuth"** was the same as an "observation;" he speaks on page 26, *49* of the "*azimuth* which he (the mate) himself *computed,*" and in both points he was in error.

At pages 51, *98*, Taylor, the mate of the bark, says: "I never took an azimuth while I was in her."

As to the other point see any dictionary.

Lecky's Wrinkles in Navigation (1890), p. 84.

The importance given to this review of the District Judge's opinion lies in the fact that the claimants' counsel convinced the District Judge that Taylor's evidence was perjured, and did so by having him believe that the courses the bark sailed, as testified to by her witnesses from *her compasses,* were the true magnetic courses she was on.

That the bark's compasses were affected by the magnetism of the iron of her hull was shown by Tay-

lor's evidence, and it was the claimant's counsel who brought this evidence out: "the bark had a standard "compass, because she is an iron ship and there is a "little *deviation* always in an iron ship. Sometimes "the compass on deck will not be accurate, and some- "times it is. I don't know what makes it accurate "sometimes, when it is not so at other times. In the "English Channel there was **two points differ- "ence between the standard compass and "the steering compass,** that is, on easterly "courses, off this coast they were equally alike. I com- "pared them myself. I know the difference between "the **deviation** of the compass and the *variation* of "it" (48, *90*).

"'Deviation' is also the *attraction of a* **ship's iron** on the needle."

Smyth's Dictionary of Nautical Terms, p. 245.

"'Variation.' A term applied to the deviation of the magnetic needle or compass from the true north point towards either east or west, called also the *declination.* The variation of the needle is * * * an arc of the horizon comprehended between the *true* and the *magnetic* meridian."

Smyth's Dict. of Nau. Terms, p. 710.

In other words, the "deviation" is the difference between the pointing of the compass needle on a vessel and the pointing of the same or a similar compass outside of and away from the influence of any vessel; and the "variation" is the difference between the pointing of a compass outside of and away from the influence of any vessel and the true north.

Taylor further says:

"There was a **deviation card** on board of the "'Helen.' I never looked at in my life; I only saw it "(48, *91*). I never took an **azimuth** while I was in

" her (51, *98*). I took her course by the *standard* com-
" pass, but *they were both the same at that time.* The
" *standard* compass was in the fore part of the mizzen
" mast, a few feet below the crosstrees. The *other com-*
" *pass* was in the skylight. There were lights in them.
" I could see the standard compass from the deck. It
" was arranged to show face downward. The other
" compass could be seen by the man at the wheel " (46
86).

There is another error in the compass of an iron vessel called the **"heeling error."**

In "The Mathematical Theory of the Deviation of the Compass, arranged for the use of the Cadets at the U. S. Naval Academy, by J. A. Howell, Commander U. S. N," published by the Government, 1879, at page 28, is the following:

" *Explanation of the Nature and Cause of the Heeling*
" *Deviation.*—In an *iron* ship built in England, the north
" end of the pole is generally drawn downward. When
" such a ship is on a north or south course *and heels*
" *over*, this force becomes partly a lateral force and
" draws the north end of the needle to windward; at
" the same time the horizontal deck, beams and all
" other transverse horizontal iron become magnetized
" by induction, the upper or weather end attracting the
" north end of the needle to windward. These two
" causes, therefore, so long as the ship is in the northern
" magnetic hemisphere act in the same direction and
" often produce a large **heeling error** to windward."

At page 17, the same author says:

" In all ships the semi-circular deviation changes
" with a change of geographical position."

* * * (P. 13.) " In iron built ships, the *neutral*
" *points*, or points of no semi-circular deviation,
" approximate to those points of the compass
" to which the ship's head and stern were directed in
" building, the deviation being easterly when the part of

" the ship which was south in building is east, westerly " when it is west."

At page 13 of the same work a **deviation card** is printed showing a deviation of as much as 24 degrees, or *over two points.*

See also Evans' " Elementary Manual for the Devia- " tions of the Compass in Iron Ships," London, 1882, and Towson's " Practical Information on the Deviation of the Compass," London, 1872. In the latter, at page 41, the author says: " In some cases the deviation " from heeling has amounted to as much as two degrees " for each degree of heel of the ship; that is, without " altering the real direction of the ship's head, the ap- " parent alteration by compass has amounted to 40° by " heeling the ship from 10° to port to 10° to star- " board."

See also " The Standard Compass," by J. Daniel, published by Dunsford & Son, 26 and 28 South Castle street, Liverpool, 1883. *

The amount of the deviation of the bark's compasses due to the effect of her iron hull and the list or heel to starboard (45, *85*) can only be inferred, but can be arrived at with considerable accuracy. The bark's witnesses say the wind was *very nearly aft*, only about one point on her starboard quarter (Brown, 40, *72*; Taylor, 45, *86*, 48; Camilleri, 42, *76*, *79*), and the sails she had set *and taken in* corroborate this (46, *86*), and the District Court so found (25). Therefore, when the direction of the wind was ascertained the course of the bark became known—and the *correction* of her compass also. Both District (25) and Circuit Court (92, *184*, 3d Finding; 89, *176*) found that the wind was between S. W. and S. S. W., and the bark, therefore, must have been heading between N. E. and N. N. E.; that is, she was heading N. E. by E., if the wind was S. W. and one point on the starboard quarter; N. E. by N. if the wind was S. S. W. and one point on the starboard quarter. That it appeared to be W. S. W.

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* Bowditch Navigator, 5th 32, 38, 47.

by the bark's compass (46) when it was in truth S. W. showed that the deviation of that compass was two points *westerly* on that course, and that as *her* compass course then was E. by N. ½ N. her true course then was N. E. ½ E. As the District and Circuit Court each found that the bark was heading N. E. (D. C., 24, *45*; C. C., 3d Finding, 89, *176*), the wind must have been S. W. ½ S. to have been one-half point on the bark's starboard quarter, or S. W. by S. to have been one point on her starboard quarter.

If the wind was S. W. ½ S., and appeared by the bark's compass to be W. S. W., there was a westerly deviation of two and one-half points, and when she appeared to be heading E by N. ½ N., she was really heading N. E.

The deviation of each vessel is a characteristic or idiosyncrasy of her own, and is usually ascertained by *swinging* her when in port and making a deviation card, showing the amount of deviation between the ship's standard compass and a shore compass or known objects, and it is usually found that the amount of deviation increases as the ship's head approaches E. or W., and diminishes as it approaches N. or S., and that the heeling error is greatest at N. or S., and least at E. or W., but may add to or decrease the deviation.

See Bazin vs. S. S. Co., 3 Wall, Jr., 239, for a recognition of the existence of deviation in iron vessels.

The Exceptions.

(**1**) There is no exception to the admission or rejection of evidence.

(**2**) There is no exception to any finding on the ground that it is without evidence to support it, or that it is against the uncontradicted evidence, **and such statement of grounds is necessary** if that is the contention.

In the **Francis Wright,** 105 U. S., 381, the Court says :

" Every bill of exceptions must state and point out " distinctly the errors of which complaint is made. It " ought also to show the grounds relied on to sustain " the objection presented, **so that it may appear " the Court below was properly informed " as to the point to be decided.** It is needless " to say that this bill of exceptions meets none of these " requirements. **From anything which is here " presented no Judge would be presumed to " understand that the specific objection " made to any one of his findings was that " no evidence whatever had been intro- " duced to prove it ; or to one of his re- " fusals, that the fact refused was material, " and had been conclusively shown by un- " contradicted testimony.** No ground whatever " is stated for any one of all the exceptions which have " been taken. To entitle the appellants to be heard " here upon any such objections as they now make to " the findings **they should have stated to the " Court that they considered the facts re- " fused material to the determination of " the cause, and that such facts were con- " clusively proven by uncontradicted evi- " dence.** Under such circumstances it might have " been permissible to except to the refusal, and pre- " sent the exception by a bill of exceptions, which " would contain so much of the testimony as was neces- " sary to show that the fact, as claimed, had been " conclusively proven."

The language cited from the " Francis Wright " shows that an exception in the Circuit Court **is not a mere formality ;** that upon it the action of the Circuit Judge, in the due administration of justice in the case, is to be predicated, and that **his attention** is to be called, by the exception, to the defects men-

tioned, **in order that thereupon he may either correct what is shown to be an error, or afford an opportunity to the parties to supply what is shown to be an omission.** In this respect the case is precisely analogous to the rules applied in jury trials. The exceptions must be made in time to have the correction applied if the Circuit Judge sees occasion; the exceptions in a common law case must be made before the jury leaves the bar.

In **Walton vs. U. S.** (9 Wheat, 651) the Court says:

"It will be sufficient if the exception be taken at "the trial and noted by the Court with the requisite "certainty; and it may afterwards, *during the term*, "according to the rules of the Court, be reduced to "form and signed by the Judge. * * * *But in all* "*such cases* the bill of exceptions is signed *munc pro* "*tunc*, and it purports to be the same as if actually "reduced to form and signed pending the trial. And "it would be a fatal error if it were to appear other- "wise; for the original authority under which bills of "exception are allowed has always been considered "to be restricted to matters of exception taken pend- "ing the trial and ascertained before the verdict."

The above case is cited with approval in **R. R. Co. vs. Heck** (102 U. S., 120), and in the last case cited the Court refused to consider an objection made after the verdict, saying (120):

"A trial Court may, in the exercise of its judicial "discretion, grant a new trial if convinced that its "charge was wrong, **even though its attention** "**was not called to the error complained of** "**before the case was finally submitted to the** "**jury.** But not so with us. Our power is confined "to exceptions actually taken *at the trial*. The theory

" of a bill of exceptions is that it states what occurred " while the trial was going on."

The language used by Judge TANEY in **Phelps vs. Mayer** (15 How., 160), at page 161, is:

" Nor is this a mere formal or technical provision. " It was introduced and is adhered to for purposes of " justice. **For, if it is brought to the atten- " tion of the Court that one of the parties " excepts to his opinion, he has an oppor- " tunity of reconsidering or explaining it " more fully to the jury. And, if the ex- " ception is to evidence, the opposite party " might be able to remove it by further " testimony if apprised of it in time."**

And in that case an exception filed the day after the verdict was held too late.

See also U. S. vs. Cary, 110 U. S., 51.

In the case of **"Annex No. 3,"** 38 Fed. Rep., 620, Judge BLATCHFORD, in considering the case of Bronson vs. Schulten, 104 U. S., 410, said (621):

"In Bronson vs. Schulten the suit was one at law, " and it was there stated to be a well-established rule " ' that, after the term has ended, all final judgments " ' and decrees of the Court pass beyond its control, " ' unless steps be taken during that term, by motion " ' or otherwise, to set aside, modify, or correct them; " ' and if errors exist they can only be corrected by " ' such proceedings by writ of error or appeal as may " ' be allowed in a Court which, by law, can review the " ' decision.' *This rule is equally applicable to suits ' in admiralty.*"

(**3**) The **seventeenth** exception.

This is made up of twenty-one specifications of exceptions to the *opinion* of the Circuit Judge.

The opinion is not the subject of exception or review. The **"Elizabeth Jones,"** 112 U. S., 519: "The "opinion of the Court, although, as required by a rule "of this Court, annexed to and transmitted with the "record, is no part of it."

(**4**) The other exceptions.

In the language of Justice WOODS in the "Annie Lindsley," 104 U. S., 187:

"The assignments of error, which are sixteen in number, may be fairly condensed as follows:

"1. The Court erred in refusing to find the facts as requested by the claimant.

"2. The Court erred in refusing to find the conclusions of law as requested by the claimant.

"3. The Court erred in certain of its findings of fact.

"4. The Court erred in finding as a matter of law that the bark was in fault by putting her wheel to starboard.

"5. The Court erred in finding as a matter of law that libellants were entitled to a decree.

"The first and third assignments are disposed of by the 'Abbotsford' (98 U. S., 440) and the 'Benefactor' (102 *Id.*, 214).

"In these cases it was held that under the Act of February 16th, 1875, Chap. 77, entitled 'An Act to facilitate the disposition of cases in the Supreme Court of the United States and for other purposes' (18 Statutes, Part 3, p. 315), the finding of facts by the Circuit Court of Admiralty is conclusive. Upon an appeal from a decree in admiralty rendered since May 1st, 1875, when the act went into effect, we cannot look into the evidence or the *opinion of the Court* to ascertain the facts. *The evidence is not properly in the record*, and by an amendment to rule 8, promulgated May 2d, 1881, it is excluded from the transcript ('The Adriatic,' 103 U. S., 730).

"Where the Circuit Court has passed *on all the is-*

sues we cannot listen to complaints that it has *refused to find* certain facts which it was asked to find, or has found certain other facts which *the weight* of the testimony did not warrant. This disposes also of the second ground of error.

"As the conclusions of law which the Court was asked to declare were based on the findings of fact proposed by the claimants which the Circuit Court refused to adopt, the question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree, as it is raised by the fourth and fifth assignments," and the closing words of the same opinion are: "*Our duty is to decide whether the findings actually made by the Court support its conclusions of law and the decree, and there our duty ends.*" *

Applying the above classification to the exceptions filed in this case, it will appear that exceptions 18 to 36 all fall in the first class; that exceptions 37 to 52 all fall in the second class; that exceptions 1 to 13, inclusive, all fall in the third class, and that exceptions 14, 15 and 16 fall in the fifth class.

In the "**E. A. Packer,**" 140 U. S., 364, this Court says:

"It does not, however, necessarily follow that this Court is bound to determine the case upon the precise facts found by the Circuit Court, if in its opinion such findings are *ambiguous*, *contradictory* or *incomplete*, or fail to establish a satisfactory basis for a decision.

The Circuit Court is bound to pass upon and find *every material and ultimate fact* necessary to a proper determination of the question of liability; and, in case of refusal to make *such finding*, an exception may be taken thereto, which can be considered by this Court upon appeal. * * * If a Circuit Court could find, *as a fact*, that a collision was due to the fault of one vessel, and unless the findings set forth *all the material facts*, the ultimate finding of fault becomes more or less a

* The Burlington 137 U. S. 392
. Gazelle 128 . 474
. M. J. Smith 128 . 649

finding of fact, when it should be a legal inference from other facts.

So far the "E. A. Packer" has modified the "Annie Lindsley," and it becomes necessary to inquire whether all the *material* facts have been found, or, in other words, to see if any *such* finding (*i. e.*, of a material fact), has been refused, and the refusal excepted to.

Exceptions 1 to 13, inclusive, relate to the correctness of the facts as found; and as they are not founded on the want of evidence to support them, they might be disregarded on the authority of the "Francis Wright;" but to meet any possible contention they will now be reviewed in a summary way.

(**1**) The **verbal** criticism made is that the finding that the wind was blowing from the "S. W. or S. S. W." (*i. e.*, latitude of $22\frac{1}{2}°$ from exact precision of expression), is "no finding of direction." This is sufficiently met by a denial of the assertion. Such finding puts before the mind of the Court the direction of the wind as being *generally* southwesterly. And the *fact* is of no importance to the case except as the basis or *evidence* of another and material fact, viz., the heading of the bark which had the wind nearly aft, a little on her starboard quarter.

The collision occurred about 20 miles nearly N. E. of Atlantic City (Absecon), where the Signal Service Observer recorded the wind at 9 and 11 P. M. as S. W. steady (38, *69*).

Wolf, lighthouse keeper of Absecon light, near Atlantic City, brought to impeach the accuracy of the signal service observations at Atlantic City, testified that he had no instruments, but *in the night time* knew the direction of the wind by getting right in the eye of the wind, and by the lighting rod, the doors and windows on his tower; that he made his last observation at 8:30 P. M. and that the wind was then S. The value of his evidence is shown by this extract: "The line of the beach is irregular, but it generally looks N. and S.

(63-*126*)." A glance at the chart will show that the trend of the beach at Absecon is N. E. by E. ¼ E. and S. W. by W. ¼ W., so that when Wolff says that wind was S. *his* S. was really S. W. by W. ¼ W. In the *day time* Wolff says the wind was S. W. (63) and it was then S. W. at the signal station (38, *69*).

Taylor, who testified from the compasses of the bark, stated the wind, as he observed it by those compasses, was W. S. W. At Barnegat (65–*136*) and Cape May (66) the wind was S. *steady* at 9 P. M.; at Barnegat S. *variable* at 11 P. M.; at Cape May S. *steady* at 11 P. M.

The observed velocity of the wind at

Cape May (66) 9 P. M. was 25 m.; at 11 P. M., 25 m.
Atlantic City (38), 9 P. M., was 13 m.; at 11 P. M., 16 m.
Barnegat (9), 9 P. M., was 24 m.; at 11 P. M., 14 m.

The witnesses on the "City of New York" say the wind was S. or southerly.

Baar, the wheelsman, says the wind was about ahead, and that the course of the steamer was S. by W ½ W. (55).

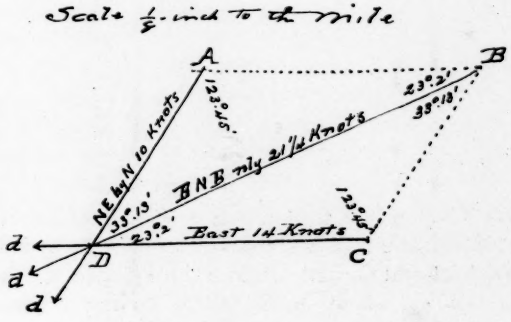
Deakin, the captain, says it was S. (59); Johnson, the mate, says the wind was S. or nearly so (66, *132*).

Walker, captain of the "Old Dominion," says 9:50, "Strong breeze from the S." (64, *128*). The log of the "Ada F. Crosby" *at noon* of the 28th (Note: by sea time, Sunday begins at 12 noon on Saturday) says, "Steady breeze *from the southward*" (81). The original libel alleged the wind to be W. S. W. (1). If the wind was S., the bark must have been heading very nearly N., if she had the wind nearly aft or a little on her starboard quarter, and consequently must have been heading *directly on shore*. Observations of the wind *on a steamer* are never reliable.

The "Oder," 11 F. R., 283.
The "Hammonia," 4 Ben., 518.
The "Adriatic," 17 Blatch., 195.

If the wind was south and the steamer headed west of south, the wind must have been on her port side, which would then be her windward or weather side—yet the wheelsman stood on the *starboard* side (Baar, 55, *108;* Johnson, 70), and the wheelsman always stands on the *weather* side. See "Weather-wheel," Smyths Dict. Nau. Terms, p. 725.

See Leckey's Wrinkles in Practical Navigation (1890, p. 439), in which he says, under the subjoined figure: "Let D C represent the course and hourly speed of a steamer, say due east 14 k.; let A D represent the true direction of the wind in hourly velocity, say north-east by north 10 k. If the atmosphere were calm, the wind caused on board the vessel by her onward movement would *appear* to come from right ahead at a rate exactly equal to her speed; therefore the line C D may be taken to represent a wind blowing in the direction of the arrow with a velocity of 14 k. an hour; then A D and C D are the two components of the resultant B D, which latter shows the *apparent* direction and velocity of the wind as felt by an observer on the deck of the vessel, viz.: east northeast nly. 21¼ k. per hour, this result being due to the *combined* directions and velocities of the true wind, and that produced by the motion of the steamer."



It will be thus seen that the finding of the Court, that the wind was southwest, was entirely justified by the evidence, and the District and Circuit Courts both concur in making that finding.

(**2**) "They except to the finding that the vessels could *not* discover one another at a distance of one-eighth of a mile."

Estimates of distance, **especially on the water,** are always unreliable, and when to these natural uncertainties is added the obscurity of the night and the dense fog, such estimates become totally worthless.

"The Webster," 18 F. R., 726.
"The Aurania," 29 F. R., 111.
"The Favorita," 18 Wall., 602.

The Great Republic, 23 Wall, 29 :

The finding is abundantly justified by the evidence. Captain Deakin, of the "New York," says, "I could not see our boats when they were off picking up the crew from the time they left the side of the steamer until they got back (61, *121).* I could not see the *hull* of the bark, *because it was foggy.* How far off the sails were when I first saw them is a pretty hard question to answer. It might be forty feet and it might be twenty-five feet from the ship's bow" (61, *121).*

Sherwood, the first mate of steamer, says, "You could not see the whole length of her (the bark) on account of the fog" (65, *129).*

Brown, (wheelsman of bark) (39, *70),* says, "I could not see so long as the vessel when the steamer struck, because of the fog."

(**3a**) They except to the finding that the course of the bark was about N. E. instead of about N. E. by N. $\frac{1}{2}$ N. The District and Circuit Judges both found the bark to be heading about N. E. Such finding depended largely on the direction of the wind, and is inferred by

the District Judge from the course the bark must have been on to get to the position where she lay sunk after the collision, and the bearings of the various light-houses testified to by the mate of the bark, and is corroborated by the allowance for the deviation of the bark's compasses shown above, and also by the position of the vessel on the bottom as observed by the diver Haggerty, lying headed up the beach about N. N. E. (78).

(**3b**) They except to the finding that the steamship was going about eleven knots an hour.

Capt. Deakin says (61, *122*) she passed Barnegat at 9:40; Barnegat, bearing W., perhaps 9:45. "From that time to the collision, I gave her the rate of about eleven miles an hour. *That would be her average speed* with the trim she was in; nearly that. I believe the patent log was looked at after the collision. I have a slight remembrance of its being reported eleven and a half miles from the time it was last put out. * * * The steamer made thirteen and a half knots under steam *and sail*" [Note: she had no sail on (68, *135*)]; "she was going against the wind" (61–*122*).

Sherwood, the first officer, says: "The 'New York' had been running from New York eleven or twelve knots till I went below. Under steam her full speed was twelve knots." He went below near 8 o'clock (65–*129*). The "New York" passed Barnegat bearing W. at 9:45 P. M., distant five miles (Deakin, 59–*117*), and the collision was at 10:50 P. M., and the place of the collision is marked by the bark sinking there, and as that place on the chart is distant thirteen and a quarter knots from a point where Barnegat bears W., distant five miles, it follows that the speed of the steamer must have been twelve knots an hour, or she could not have got there in sixty-five minutes, and the finding of eleven knots is too favorable to her.

The **Martello**, 39 F. R., 508, LACOMBE, J.: "The

most persuasive argument as to her rate of speed is found in a comparison of the time which elapsed with the distance traversed."

(**4**) This is but a *verbal* criticism of the finding, and needs no comment more than to say that a N. E. course was a course of eastward across the steamer's bow (the steamer heading S. by W. ½ W.).

(**5**) This is also a *verbal* criticism, but the evidence supports the statement that the alarm whistles were blown as soon as those on the steamer saw that the bark was heading to the eastward—*i. e., across the course of the steamer.*

Johnson, the mate of the steamer, assumed that the bark was heading the opposite of his own course, *i. e., parallel.* He says: "She was apparently standing opposite to us" (67), which would be N. by E. ½ E. The Court has found that she was really heading N.E., or 2½ points (equal to 28°) further to the eastward, and as the bark was then on his starboard bow, he would naturally only see her head sails, or as he says, "I saw the sails on the foremast, and nothing else" (67), but as she proceeded on this angle of 28° her masts would *open* and he would see the sails between, which he *assumed* to be caused by a rounding-to (67), and when he saw what he *assumed* was this rounding-to he blew the *general alarm*, and rang the engine bell to slow, stop, and reverse just as quick as he could pull (69), and Bloxam, the engineer, says, "the sound of the gong had not stopped" before he got the engine reversed (58), and McNeil, the oiler, says, "the engine was reversed less than a second after we got the signal, * * * the engine was reversed before the sound was out of the bell" (58–*115*). Johnson says: "The bark at the time I *felt* the reverse was about 100 feet away" (67–*133*), and Bloxam says the first signal to reverse was only fifteen to twenty seconds before he

felt the jar of the collision (58–*114*), and McNeill says the screw had only made five or six turns backs before the collision (58–*115*). The rapidity with which the engine was reversed was due to the fact that both men, Bloxam and McNeill, were standing at the reversing link at the moment the signal came (58).

Brown (look-out on steamer) says (52, *100*) he saw first only the sails on the foremast; that "*when I reported the sail the officer of the watch blew the whistle three or four times in succession.*"*

"Then the bark answered with a horn three or four blasts in return and *then* she rounded right to. * * * When I *seen* the bark round to I reported, 'She is coming across our bows'" (53).

"(52, *101*) She rounded to so I could see her light then, the *port* side light" (*i.e.*, her *red* light, which was the only one the bark on a N. E. course could ever show to the steamer). * * * "I saw the red light before the second report; it was seeing the red light that made me think the bark had rounded to"(54, *105*).

It is apparent that the look-out assumed that the bark was headed parallel with the steamer and if so parallel, as she was on the steamer's starboard bow she ought to show her *green light, but no one* on the steamer ever saw the bark's green light.

(**6**) They except to the finding that the engines were reversed probably not to exceed 150 feet away.

The evidence cited under the 5th exception will show that this finding was entirely justified. The steamer was moving at the rate of at least 1,110 feet in one minute; the bark was approaching her at an angle of 28° at the rate of 404 feet in one minute.

If the interval was fifteen seconds, as estimated by

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* NOTE. This was a general alarm.

Johnson (69) says: "When I blow a general alarm I blow it in blasts as short as I can, four or five in quick succession."

Bloxam, from the time he heard the first bell until the collision, the distance at the rate of 1,500 feet in one minute (equal to 25 feet in one second) would be 375 feet. That there had been some diminution of the speed by the retarding effect of the change of rudder is known, but its amount is uncertain and the distances apart is on a *direct* line, while the courses were on broken lines, and the estimate of the Court "not to exexceed 150" is justified by the testimony as to the density of the fog, and as to the inability to see more than the length of the bark.

(**7**) This is also a *verbal* criticism. No one timed the sinking of the bark, and it is immaterial whether it took her one or three minutes to sink. The fact that she received a wound extending *down her side ten feet and into her deck five or six feet*, cutting through the iron plates of her side and deck and into the solid cargo as far as it did (77, *154*), shows the extent of her wound and the velocity of the steamer at the moment of impact.

(**8**) They except to the finding that the *whistle of the steamer* heard on the bark indicated to them that the vessels were *quite near* to each other.

This is another verbal criticism. Estimates of distance at which a sound is heard in a fog are unreliable and misleading. The finding is justified by the evidence. The whistle from the "New York" was heard twice. The first was faint because the wind carried the sound away. (Note: The wind was blowing from the bark towards the steamer.) Brown at the wheel of the bark heard only one whistle, and saw the vessel a very short time afterward (39, *70*).

Taylor, the mate of the bark, first heard a whistle from the steamer about the port beam (46, *89*). He was at that time forward and immediately went aft (46, *87*), and immediately afterwards saw the steamer's

masthead and then her green light, and formed the idea in the fog that it was about the bark's length off (47, *88*).

(**9**) They except to the finding that those on the bark "thought the steamer was approaching, bearing abeam on the port side."

Brown (41) says:

"If I told the consul that the whistle sounded on our port bow, that was right; *not on the port bow, sir, it was a little on the quarter*" (40, *73*). When I heard the steamer's whistle the sound came on the port *side*. I heard it nearly across the mizzen rigging, a little bit on the *quarter*."

Camilleri (42, *77*) says: "These whistles were both on the port *side*."

Taylor (46, *86*) says: "I heard it (steamer's whistle), as near as I could judge, from a little before the port *beam*—about the port beam" (51, *97*). "The whistle of the steamer sounded as if it was about abeam."

The direction of sound in a fog is one of the *worst uncertainties* in navigation, and error of location cannot be deemed a fault (The Lepanto, 21 F. R., 656).

(**10**) They except to the finding that "the order to port the wheel of the bark was *after seeing the green light* of the steamer."

This order was given by Taylor. He says (46, *87*): "Shortly afterwards" (after seeing steamer's masthead light) "I saw her green light; when I saw that, I was on on the poop. I was forward when I heard the whistle. Just when I heard the whistle I went aft, after telling them to keep blowing. While I was forward I did not see the masthead light. When I saw the green light I had no idea how far off it was; it was pretty close, anyway—about the bark's length off. *After seeing the green light*, * * * I went to call the captain. * * * I went to the companion way in the after

part of the mizzen mast. I sang out to them to come on deck; that there was a steamboat on top of us. Then I told the man at the wheel to luff a little, which was all the same as porting. That was done. *The steamer was then on top of us nearly* —quite close to us. There wasn't the least possible chance of avoiding a collision when I sung out that" (50, *95*). I forget whether it was before or after I saw the green light that I called the captain. * * * *When* I told the man at the wheel to luff I saw her mast-head light *and the green light.*

"Q. Did not the bark change her course when you gave the order to luff? A. I don't know, *but I don't think she had time to alter much.*"

Brown (wheelsman on bark) says (39, *70*), "I could not see so long as the vessel when the steamer struck, because of the fog" * * * (39, *71*). "When I saw the light the mate told me to luff, and **before** *I got the wheel down the steamer struck us.* I did not see more than one light on the steamer. I saw the mast light."

Camilleri (lookout on bark) says (42, *78*), "When the steamer blew her whistle I reported it not close. The wind blew the sound of the whistle back. The mate looked like that (indicating); he could see nothing; too much fog—plenty. * * *

"Q. Did you see the light of the steamer?

"A. *Oh, too close, too much plenty fog.* * * * (45). I could see the light on the steamer when she was *very close* to. I saw the the two side lights" (*i. e.*, when the steamer was directly ahead of the position of the witness). "I did not see the mast-head light. Afterwards I saw only one light—the red light" (*i. e.*, when the position of the witness had passed the bow of the steamer).

(**11**). They except to the finding that "the man at the wheel had hardly got the wheel over when the steamer struck the bark."

This was testified to in almost those words by Brown (39, *71*).

The qualification to this exception—"if by that it is meant that there had not been time to change the course of the bark four or five points"—may be considered in connection with the 13th exception to the finding that "the bark changed her course one or two points by the time the vessels came together."

Brown (wheelsman of the bark, with the bark's compass before him) says (39, *71*): "Q. When you put the wheel down did the bark mind her helm at that time? A. It was about a point from course * * * (40, *73*). I looked at the compass at the time the steamer struck us. The mate told me to luff, and **before** *I got the wheel down* she struck us. The bark changed her course before the blow a point. * * * When he told me to luff I took the wheel quick down."

If the bark changed one point under her port helm from a N. E. course she was heading N. E. by E. when the steamer struck her, and if the collision occurred, as Haggerty (the diver) judged it did (78, *155*), by the fracture in the bark's side, the steamer was heading S. ½ W.,* for the angle between the *keels* of Haggerty diagram is 50° = 4½ points, and this substantially agrees with diagram No. 4 of Camilleri (42, *78*), where the angle is 47°.

In Taylor's diagram (51, *96*) the angle is 77°.

In F. Brown's diagram (54, *104*) the angle is 74°.

In Deakin's diagram (60, *119*) the angle is 82°.

In Johnson's diagram (68, *136*) the angle is 73½°.

And the steamer by these angles was heading between S. by E. ½ E. and S. S. E. ½ E.

(**12.**) They except to the finding that the steamer "under her hard a-starboard helm changed her course to the eastward three or four points."

The steamer's course when she first heard the bark's fog horn was S. by W. ½ W. Her steering compass had

* The Steamer's answer (record p. 18) says she headed "about S or S by W."

one-fourth of a point deviation, [although built of wood (2d Finding, 88)], and she was steering by it S. by W. ¾ W. (67, *134*) and starboarded (67) on hearing the foghorn (66, *132*), and then hard a-starboarded (70). Baar (the wheelsman of steamer) says (55, *108*) he put it *hard* over, and this would throw the steamer's head to port, *i. e.*, to the eastward.

How far she ran under the starboard helm is uncertain. Johnson says he ran after starboarding seven or eight lengths (70, *140*)=1,936 feet. He answered the fog horn with a blast of the whistle, and after that heard the fog horn again (67). Camilleri says (43), "I heard more than one (whistle) from the steamer that struck us—I heard it twice," and that he and Jacob (who was drowned) were blowing all the time, he can't tell the number.

But it is certain that the steamer had not reduced her speed, while under her starboard helm. Johnson says that, "After hearing the fog horn until the lookout reported the fog horn or the bark was about a minute and a half" (69,*138*), and at the rate of 11 knots she would run 1,665 feet in that time, or seven lengths, and Johnson says (69, *138*), "At the rate the steamer was going that night and under a starboard (he does not say *hard*) she would not run very far before she would change three-quarters of a point—about twice her length."

The Circuit Judge believed the testimony of those on the bark, that her course was changed by porting one point, and as he found that course to be N. E., such change made her head N. E. by E., and if the angle of Johnson's diagram (68) is correct, the steamer must have headed S. by E. ½ E. at the collision, which would be a change to the eastward of three points from her course of S. by W. ½ W.

If the angle of Deakin's diagram (60) is correct, her change was four points, and if the angle of Taylor's diagram (51) is correct, her change was three and one-half points.

The steamer's screw was left-handed (Bloxam, 58, *114*; Johnson, 69, *138*) and on reversal *such a screw* throws the steamer's head to port; (Johnson, 69, *138*), White's Naval Arch. (650). The hard-a-starboard wheel would throw the head to port, and the reversal of the engine (which was at the same moment as the porting of her helm), would continue to throw her head to port, and the ported helm would not *neutralize*, though it might deaden, the effect of the screw.

The Arratoon Apcar, 15 Ap. C., 40.
The Alhambra, 25 F. R., 856.
The Britannia, 34 F. R., 555.

In the book entitled "Text-Book of Seamanship," by Commodore S. B. Luce, U. S. Navy, revised and enlarged by Lieutenant Aaron Ward, U. S. Navy; D. Vannostrand, 23 Murray street, N. Y., 1884. At page 634 is the following:

"III. Ship Moving Ahead, Screw Backing. With "midship helm, in vessels with left-handed screws, the "bow turns to port; with right-handed screws the bow "turns to starboard."

In the book published by the U. S. S. Navy Department, entitled "Examples, Conclusions and Maxims of Modern Naval Tactics, by Commander Wm. Bainbridge Hoff, United States Navy; Washington, Government Printing Office, 1884," at pp. 50, 51, will be found:

"Also the reversed screw will exercise an influence "which increases as the ship's way is diminished, to "turn the ship to starboard or port according as it is "right-handed or left-handed; this being particularly "the case when the ships are in light draught."

At p. 53 will be found experiments with the ship "Hankow," screw *right-handed;* going full speed ahead; helm amidships; engine suddenly reversed full speed astern; head turned 27° to *starboard* before ship came to rest.

In the "Report of the Committees on the Steering of Screw Steamers," by the British Association for the

Advancement of Science for the years 1875, 1876, 1877, 1878, will be found numerous similar experiments, all with the same results. An instructive one at p. 9 of the report of 1878 was the case of the steamship "Tabor." Right-handed screw with the helm amidships; vessel full speed ahead; the ship's head fell off to starboard 79° before her way was stopped; with the helm hard-a-port the ship fell off to starboard 42° under the reversed wheel. With the helm hard-a-starboard the ship fell off 67° to starboard before the ship was stopped.

The Real Questions of Law of this Case.

(**14**) Three grave faults are found against the steamer in the first conclusion (90), and she is adjudged guilty of violating the 21st rule, which, in 1879, read:

"Every steam vessel, when *approaching* another vessel so as to involve *risk* of collision, shall slacken her speed, or, if necessary, stop and reverse, and every steam vessel shall, when in a fog, go at a moderate speed."

R. S., § 4233, Art. 21.
Same as § 16 of Ch. 69, Acts 1864.

These three faults are:

(**a**) She *did not slaken her speed* when she heard the fog signals of the bark.

(**b**) She did *not go at a moderate speed when in a fog.*

(**c**) She *changed her course* and kept on at great speed after she heard the bark's fog-horn *before seeing her.*

a. The rule as to slakening speed when approaching another vessel is operative only when such approach

"involves *risk* of collision," and what *risk* of collision must be ascertained to properly apply the rule.

When vessels are navigating in a fog, each unaware of the *position* or *course* of the other, with no other indication to guide their judgments than the uncertain and intermittent sound of a fog-horn or fog-whistle, it would be pretty bold to assert that there was no risk of collision so long as they continued ahead within ear shot; but to allege and argue that risk of collision does not exist until the *certainty* of collision arises is bolder still.

They do not mean the same thing. *

In the **"Manitoba,"** 122 U. S., 108, the Circuit Court had stated: "it behooved those on her (the 'Manitoba') to be prompt in availing themselves of any resource to avoid *not only a collision, but the* **risk** *of such a catastrophe*" and "that the 'Manitoba' was in fault for not slowing up, and in failing to reverse her engine until too late to accomplish anything thereby," and this conclusion was based on the finding that "there was manifest *uncertainty* as to the intentions of the 'Comet.'" And this Court approved the conclusion (p. 109).

The "*manifest uncertainty*" in that case existed, although the *lights* of each vessel were visible to the other. How much greater the uncertainty when neither could see the other in the dense fog.

The Court cites the **"Stanmore"** (10 P. D., 136), where Judge BRETT says:

"Therefore we arrive at this result, which sailors must remember, that if *in all probability* a vessel has done something which *if*, in fact, she has done, it will produce *risk* of collision, a person who is aware of the fact of *this probability of risk*, ought to consider that there is risk."

In the **"Arratoon Apcar,"** 15 Ap. C., 40, the Court lays down the general principle: "A prudent seaman * * * would have stopped, or at least have

* The Blue Jacket 144 U.S. 391 where the Court says: "The tug was in the situation of a steam vessel before the time when it became her duty to stop and reverse." and on p 394 where the Manitoba is distinguished

slackened speed, *until the* **course** *of the approaching vessel could be made out with something like certainty ;*" and in that case, also, lights were seen.

See also

The Memnon, 59 L. T. (N. S.), 289. 6 Asp. M. C. (N. S.), 317 ; affd. by H. of L., 62 L. T. (N. S.), 84. 6 Asp. M. C., 488 ; cited in the E. A. Packer, 140 U. S., 369.

Rule 20 provides : " If two vessels, one of which is a *sail* vessel and the other a steam vessel, are *proceeding* in such directions as to *involve risk* of collision, *the steam* vessel shall keep out of the way of the *sail* vessel."

The contrast between the words used in rule 20 and 21 are instructive. The duty to keep out of the way, imposed by rule 20 on the steam vessel, arises when *both* are *proceeding* in such *direction* as to involve risk.

When the course of the sail vessel is *invisible* to the steamer, the steamer *proceeds* at her peril. Says *Strong, J. :* " Meeting a sailing vessel in such a direction as to *involve risk*, it was her duty to keep out of the way, and nothing but inevitable accident or the conduct and movements of the ship can repel *the presumption that she was negligent, arising from the fact of collision.*"

The **Scotia,** 18 Wall., 181.

Says DAVIS, J. : " As the steamer did not keep out of the way, and as the collision did occur, the steamer is *prima facie* liable, and can only relieve herself by showing that the accident was inevitable or was caused by the culpable negligence of the steamer."

The **Carroll,** 8 Wall., 303.

The " C. of N. Y.," on hearing the fog-horn of the " Helen," knew that there was a sail-vessel *somewhere* ahead. She *guessed*, by the *direction* of the *sound*, that

the sail was somewhere (distance unknown) on a line bearing from one (Johnson, 66, *132*) to two points (Baar, 55) on her starboard bow (how heading unknown). Those on the steamer did not even know that the bark was sailing free. Baar heard *two* blasts (56, *110*), which would indicate a vessel close-hauled on the port tack, while the three blasts she blew would indicate that she was running before the wind (Taylor, 50, *94*).

Johnson says he heard *a* fog-horn (66, *132*), and again he says: "I heard two blasts of the fog-horn—*one* before I blew the whistle, and *one* afterwards" (70, *140*); and one blast would indicate a vessel *close-hauled* on the starboard tack. Johnson says: "After I blew the second *alarm*, then they blew the fog-horn just as fast as they could right straight along from the same place. Then I could see the vessel" (70, *140*).

Johnson assumed that wind was south—and hearing *one* horn ought to have assumed that the bark (if an American vessel), was close-hauled on the starboard tack, and therefore heading between S. E. by E. and E., and consequently (if the sound was on the starboard bow) crossing his bow, and yet he *starboarded* his helm. Hearing one blast and not knowing the nationality, he could know whether she was sailing free or close hauled—nor on which tack.

The "City of New York" was therefore *approaching* the "Helen" under Rule 21, and *proceeding* under Rule 20 and there was *risk of collision*—for the 3d finding established that the courses were crossing, as the bark was heading N. E. and the steamer S. by W. ½ W., and that the vessels "were *approaching* each other" (89, *176*).

What is Risk of Collision.

"The Beryl," 9 P. D., 137, BRETT, J. I take it that the *basis* of the regulations for preventing collisions at sea is that *they are instructions* to those in charge of ships as

to their conduct, and the Legislature has not thought it *enough* to say, "We will give you rules which shall *prevent* a collision;" they have gone further, and said that "for the safety, of navigation we will give you rules which will prevent *risk* of collision. It is not enough for you to do only that which will *apparently* prevent a *collision*; we will give you rules which shall *regulate* your conduct, not merely for the purpose of *preventing* a collision, but for the purpose of preventing *even a risk* of collision." * * * We have always said that the right moment of time to be considered is that which exists *at the moment* **before** the risk of collision is constituted. The words are not "If two ships under steam are crossing **with** a risk of collision," but "are crossing so as to **involve** risk of collision"—that is, the moment **before** there **was** a risk of collision."

The Galileo, 28 F. R., 472.

The "**Milwaukee,**" Brown Ad., 331, LONGYEAR, J.: "I think, however, it is open to discussion, under Art. 16, whether the obligation of a steamship **approaching** another vessel to slacken speed does not attach the moment **risk** of collision is involved, and *whether under that article it is allowable for such ship to wait to see if there is absolutely* **danger** of collision before doing so.

"Danger of collision is of course included in risk of collision, but it is not all there is of it. * * * Danger of collision begins only when one vessel or the other begins to depart from the rules established by law. Risk of collision begins the very moment when the two vessels have *approached* so near to each other and upon such courses that by a departure from the rules of navigation, whether from want of good seamanship, accident, mistake, misapprehension of signals, or otherwise, a collision might be brought about."

The "**Nichols,**" 7 Wall., 663, CLIFFORD, J.: "Rules of navigation are obligatory upon vessels *approach-*

ing each other from the time the necessity for precautions begins."

The **"Frisia,"** 28 F. R., 254, BLATCHFORD, J.: "The tug was on a course *crossing* the bow of the "Frisia.," and was intending to cross her bow, and that they *thought* the "F." could *do no harm by keeping on. Under these circumstances*, the duty of the "F.," under Rule 21 of Section 4233 of the R. S., to *at least slacken her speed* much sooner than she did, was plain."

The **America,** 92 U. S., 437, CLIFFORD, J., considering rule 18 (meeting end on, so as to involve *risk* of collision), said: "But if they neglect to comply with that requirement" (porting) "*until it is so late* that the object to be accomplished" *(i., e.* to determine the *risk)* "cannot be effected, it is no defense to allege or prove that one or both ported their helms before the collision occurred."

The Johnson, 9 Wall., 153.

In steamer **Louisiana,** 21 How., 1, decided in 1858, before the sailing rules were enacted (Ch. 69, 1864), the steamer "Louisiana" collided with a schooner, which was *seen*, but the captain of the "Louisiana" could not distinguish whether it was at anchor or under way. The Court says (p. 5): "Notwithstanding the *uncertainty* in the mind of this officer, the vessel under his command continued on her voyage *with unabated speed.* No order was given to arrest her progress till a collision with the schooner had become inevitable. *This was a grave* error, and it was followed by disastrous consequences, for which the owners must render indemnity." Citing the James Wall, 2 W. Rob. of 271, decided in 1844, where the same doctrine was laid down.

See Opinion WALLACE, J. (94), and cases there cited; and the Louisiana, 2 Ben., 372; the Kirby Hall, 8 P. D., 71.

The change of course of the C. of N. Y. was proof

that she was *approaching* the H. so as to involve *risk* of collision (Opinion, 93).

B. (1) What is moderate speed in a fog?

(2) What is a fog?

Judge LOWELL in the **Monticello,** 1 Lowell, 187, said: "What is a fog such as the statute intends? * * * By day there must be fog enough to shut out the view of the sails or hull, or by night of the lights *within the range of the horn, whistle or bell.* * * * It is to guard against some danger which the fog would or might cause, and from which the horn might possibly guard, that it is to be blown."

The speed which is "moderate" in a fog depends on the density of the fog, which is judged of by the *distance* at which vessels may be *seen.*

The 3d finding (89, *176*) is that "the night became foggy, so much so that vessels could *not* discover one another at a distance of one-eighth of a mile."

The 5th finding is (89, *177*): "The steamer had run under hard-a-starboard helm at least a minute before the bark was *seen.* Those in charge of the steamer then discovered the bark's course was eastward across the steamer's bow. The steamer *then* sounded successive whistles of *alarm*, and those in charge saw the bark luffing to the starboard. Thereupon the mate immediately ordered the steamer's engines reversed and her wheel ported and this order was promptly executed, *but she was then close to the bark*, probably not to exceed 150 feet, and her headway could not be stopped in time to avoid a collision."

Judge WALLACE says, in his opinion (93, *185*): "That she (the C. of N. Y.) was not going at a moderate speed in a fog *is conclusively established* by the fact that she was maintaining such speed that she could not effectually check herself by reversing her engines so as

to avoid collision within the distance at which, *in the condition of the fog*, another vessel could be seen."

This definition of *moderate speed* seems logical and is supported by high authority. Some of them are gathered and extracts given by Judge Cox in **Clare vs. Prov.** S. S. Co., 20 F. R., 537. The latest is the **Nacoochee,** 137 U. S., 338, where the steamer was going half speed (6 to 7 knots, p. 337) and sighted the schooner 500 feet distant, and BLATCHFORD, J., said: "She was bound, therefore, to observe unusual caution and to maintain only such a rate of speed *as would enable her to come to a standstill by reversing her engines at full speed before* she should collide with a vessel which she could see through the fog."

The 4th finding (89) is that the " City of New York " " maintained full speed against the wind until her engines were reversed." And the 3d finding (89) is that she " was going about 11 knots an hour, which was all the speed she could make against the wind," and the 2d finding (88) is that, " when going at full speed, her headway could not be stopped by reversing her engines within a distance of one-eighth of a mile " (Deakin, 60, *120*).

C. The steamer was in fault for changing her course before she knew the position and course of the bark.

This fault is not *specified* in the libel (2, Fourth) or amended libel (10, Fifth), but is not less available to libellants. They could not know what the steamer did while hidden from their view by the dense fog, and are not required to *specify* unless they know or are bound to know.

" The Cambridge," 2 Lowell, 24, and cases cited.

That such a change was a fault was held by both the District (20, *40*) and Circuit Judges (1 Conclusion, 90,

179, Opinion 94), and I add to the cases cited by the Circuit Judge :

"The Cambridge," 2 Low., 25.
"The Scotia," 7 Blatch., 328 (BLATCHFORD, D. J.).
"The Ping-On," 11 F. R., 618.
"The State of California," 49 F. R., 174.
"The Kirby Hall," 8 P. D., 71.
"The Louisiana," 21 How., 5.

The Seafull 23 Wall 177

The **Vindomora** (1891, Ap. C., 1) is not in conflict with this principle.

Lord HERSCHELL said (p. 4) :

"I should be very sorry to say anything to indicate any dissent from the view that, where two vessels are approaching one another in a fog without any sufficient indication to justify action, neither vessel would be justified in altering her course."

Lord WATSON said (p. 8) :

"I have no wish to cast any doubt upon the soundness of the rule that when a vessel at sea overtaken by a fog becomes aware that another vessel is in her neighborhood she ought, whilst complying with the regulation as to speed, to keep on her course unless she has some indications, more or less reliable, that it would be proper or, at least, safe to change it."

Lord MORRIS said (p. 9) :

"It appears to me to be a rule founded upon common sense as well as well as upon seamanship that, if two vessels are in a fog in the same neighborhood, it is better for them to continue on the course they are on, instead of altering it, groping about and probably thereby causing a collision which might not otherwise occur."

(15) The bark's change of course was an error in extremis.

The determination of what change of course is an error *in extremis* will aid in the solution of the question.

In the **"Elizabeth Jones,"** 112 U. S., 526,

BLATCHFORD, J., says: "To be an excusable mistake *in extremis* a—pardonable maneuver, though contributing to or inducing a collision, when the maneuver would have been faulty, if not excusable—*it must be one produced by fault or mismanagement in the other vessel.*"

Was the change by the bark produced by the fault of the steamer?

The only fault charged by *the answer* against the bark is the change of course (13, *27*) which it is alleged *prevented* the steamer from avoiding her.

As Judge GRIER says, in **Haney vs. Balt. S. P. Co.,** 23 How., 291: "This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. *It is always improbable and generally false.*"

The Hercules, 17 F. R., 606.

The libel admits a porting of the bark's helm, but only when the collision was *inevitable* (Libel, 1, *2*; Amd. Libel, 10, *19*).

The 3d and 5th findings (89) combined show that the bark's fog-horn was heard on the steamer, and apparently the direction of the sound was one point off the steamer's starboard bow; that the steamer then starboarded and hard a-starboarded, *and proceeded full speed until the sails of the bark were seen*, and then discovered that the bark's course was eastward across the steamer's bow. Then she blew her alarm whistle, "and those in charge saw the bark luffing," and the steamer **thereupon** reversed her engine, but she was then **close** to the bark, probably not to exceed 150 feet. That the night was foggy, "so much so that vessels could *not* discover one another at a distance of one-eighth of a mile" (or 760 feet). That those on the bark saw the steamer's mast, headlight, "and then her green light, whereupon the mate told the wheelsman to port the wheel. **The man at the wheel had hardly got the wheel over when the steamer struck the bark.**

The bark, after she luffed, changed her course one or two points by the time the vessels came together."

In reading these findings it will be borne in mind that the *fault*, if any, was not in *giving the order* to port, but in the actual *change of course* caused by the execution of that order.

The "man at the wheel had hardly got the wheel over when the steamer struck," and the bark changed her course one or two points.

In ascertaining where the steamer was when the bark changed her course, it must be remembered that the whole of this change was seen by the steamer—both its beginning and ending—and that it was so foggy that vessels could not *discover* (not "*see*" so as to distinguish movements) one another at a distance of 760 feet. Therefore when the sails of the bark were seen and made out to be sails *on her foremast* (Brown, 52, *100*), and to be her foresail, her foretopsail and her foretop gallant-sail (Johnson, 68), all of which was done *before* the bark commenced to luff [Johnson says it was one and a half minutes before (68)] and when Capt. Deaken couldn't see her hull on account of the fog 40 feet off (61, *121*), it is pretty evident that the luff of the bark was made when the steamer was close "on top of her," as Taylor says (47, *88*)

The **Carroll,** 8 Wall., 302, is quoted from by Judge WALLACE (96, *192*).

The **City of Paris,** 9 Wall., 638, is very like this case, except that the collision was in bright daylight, the schooner "Percy Heilman" heading about west by north, with the wind free, was struck on her starboard side by the steamer and sunk in New York Harbor. The course of the schooner was nearly at right angles with the course of the steamer. SWAYNE, J., says (p. 637) :

"Her (the steamer's) rate of speed was probably from seven to eight miles an hour. The combined speed of both vessels was not less than ten miles an hour. * * * He (the lookout on the steamer) says that when first seen the schooner was from three to four points off the port bow of the steamer, and he thinks was distant four

hundred yards. Captain Kennedy of the steamer thinks she was a quarter of mile off. *Estimates of distance under such circumstances are but little to be relied upon.* It is to be presumed the witnesses in this instance made it large enough. Conceding that the distance to be passed by both vessels to the point of collision was a full quarter of a mile, the combined speed of ten miles an hour would have brought them together in a minute and a half. The orders that were given show the perturbation which existed. Captain Kennedy says: 'When the schooner was reported, the pilot and myself both ordered the helm hard-a-starboard. I said, along with the pilot, "Hard-a-starboard," and at the same time *reduced* the engine dead slow. The next order was to stop the engines and reverse full speed. I worked the indicator myself. The orders to slow, stop and reverse the engines came too late. The steamer had but little way to go. * * * The result evinces gross negligence. As soon as it was seen that the schooner was *approaching* the track of the steamer, the steamer should at once have *stopped* or reversed her engines. * * * Was the schooner in fault? When she * * * reached the steamer's track she was pursuing her regular course. This she had a right to do, and the duty rested on the steamer to see her and keep out of her way. At this point blame is imputed to her. Locman * * * says 'she luffed a little, and then kept off immediately after she luffed.' The pilot on the steamer says she 'luffed a very little while. It seemed to me about long enough to get his wheel down and then hove it up again. He appeared to be in a confused state; got frightened and did not know exactly what to do.' The conduct of the schooner must be considered in the light of the facts. **They were enough to produce consternation** * * * *A steamerof immense power was bearing down directly upon her, and rapidly approaching.* Escape seemed impossible and destruction inevitable. There was no time for reflection or precaution. The vessel and the lives of all on board were at stake. The acts complained of were

done in the excitement of the moment and *in extremis;* whether they were wise it is not material to inquire. If otherwise, they were errors not faults. In such cases the law in its wisdom gives absolution." The "City of Paris" was 1669 tons. The "City of New York" was 1715 tons.

The District Court says (21): "Her duty was to keep her course. The libellants strenuously contend that she did so, except a slight and immaterial luff of not over one point to the eastward a few moments before the collision, and when the collision was seen to be inevitable. If this was the only change of course made she cannot be charged with fault."

The Circuit Judge believed the testimony of those on the bark, corroborated by the lookout on the steamer, that the bark's change of course was *after* the steamer had blown her *alarm* whistles (95), and made the 5th finding (89, *177*)—that "The steamer then sounded successive whistles of ALARM and those in charge *saw* the bark luffing to the starboard."

The *alarm* whistles of themselves were an invitation by the steamer to the bark to do something to aid the steamer to avoid collision; it was the means the steamer used to say, "I see you—I can't avoid you *alone;* try and help me to do so"—and when the steamer said this she had by her *prior* faults got into such close proximity to the bark that she recognized that a collision was inevitable unless the bark could escape by a change of course.

(**16**) The third conclusion of law followed from the first and second and the sixth finding, which was not excepted to. No question of the amount of damages is presented.

(**17**) This exception is to the **opinion** of the Court.

The Circuit Judge fell into an error when, in his opinion, he said (96): "If she was headed about N. N. E. when she was struck by the steamer, she did not change her course more than a point and a half under her *port* helm."

The Court had *found*, as a fact, the bark was heading N. E. on her course, and a *port* helm would change her to the eastward, so that she could not be heading N. N. E. when struck; but as she sank through the sixty feet of water (2d Finding, 88, *175*) she must have been twisted; the wound being on her port side, she would fill and lie over on that side, *i. e.*, to the northward and might slant around in sinking.

The blow of the steamer was *forward* of the bark's mizzen rigging (5th Finding, 89, *177*), *i. e.*, between the main and mizzen and aft of her centre, and the effect of this would be to throw the bark's stern in the direction the steamer was advancing, *i. e.*, to the southward and eastward and her head to the northward and westward, and would account for her lying headed N. N. E. on the bottom.

(**18**) *Request.* Wind S. *Finding.* Wind S. W. to S. S. W.

(**19**) *Request.* Somewhat foggy. *Moonlight.* Sails could be seen over one-eighth of a mile. *Finding.* Foggy. Vessels could not see one another one-eighth of a mile.

(**20**) *Request.* Speed, 10 k. *Finding.* Speed, 11 k.

(**21**) *Request.* Foggy, 10:40. *Finding.* Foggy, about 10:20.

(**22**) *Request.* Course of bark, N. N. E. ½ E. *Finding.* Course of bark, N. E.

(**23a**) *Request.* Whistle heard on port bow of bark. *Finding.* Whistle heard on port beam of bark.

(**23b**) *Request.* Bark ported and headed E. or E. ½ N. at collision. *Finding.* Bark ported and headed N. E. by E. or E. N. E. at collision.

(**24**) *Found as requested.* Horn heard one point on steamer's starboard bow.

(**25**) *Request.* No change by bark, no collision. *Finding.* Change made when steamer close to bark, and only one to two points.

(**26a**) *Request.* Sails seen *immediately* after starboarding of steamer, *about* one-eighth of a mile distant. *Finding.* Steamer ran under starboard helm at least a minute before bark was *seen less* than one-eighth mile distant.

(**26b**) *Request.* Bark changed course to eastward enough to show red instead of green light. *Finding.* Bark's course N. E. Changed one to two points.

(**27a**) *Request.* Starboarding wheel changed steamer's course three-quarters to one point to port. *Finding.* Starboarding changed steamer's course three to four points to eastward, *i. e.*, to port.

(**27b**) *Request. Reversal* of engine and porting of helm of steamer changed her heading 1¾ points to *starboard. Finding.* Reversal and porting were done when steamer was, probably, not to exceed 150 feet from bark.

The evidence is that the reversal of the engine, the steamer's screw being left-handed, throws her head to *port* (Johnson, 69, *138*), (see 28 page of this Brief).

(**27c**) *Request.* At collision, steamer was heading S. S. W. ½ W. Bark then heading E. or E. ½ N.

Finding. Steamer's course S. by W. ½ W. Change under starboard helm three to four points, *i. e.*, to S. by E. ½ E. or S. S. E. ½ E. Bark's course N. E. Bark's change under port wheel one to two points; *i. e.*, to N. E. by E. or E. N. E. at collision.

(**28**) *Request.* Speed of steamer at collision, 3 to 4 k. *Finding.* Steamer's headway could not be stopped in time to avoid a collision. Testimony (Johnson, 67,

133) was that steamer reversed 100 feet away from the bark.

(**29**) *Request.* This requests a finding that the steamer could, on hearing the bark's horn, have (1) stopped and reversed her engine ; (2) ported her wheel and kept on ; (3) starboarded her wheel and kept on.

On its face, this is not a finding of *any fact existing* in this case and does not embrace *all* she could have done, for she could have slowed and combined a careful advance with a change of wheel, or a reversal with a change of wheel, or could advance at full speed without any change of wheel.

(**30a**) *Request.* The screw was left-handed.
Finding. It was.

(**30b**) *Request.* The left-handed screw would, on reversal, throw the steamer's head to starboard.
Finding. The Court did not find this. The contrary was proved (Johnson, 69, 138) and see page 28 of this brief.

(**31**) *Request.* Porting wheel and keeping on would turn steamer towards bark.
Finding. Bark's course was N. E., and the direction her horn was heard was one point on steamer's starboard bow, and steamer's course was S. by W. ½ W. *This completely found as requested.*

(**32**) *Request.* Starboarding wheel and keeping on would turn steamer away from bark.
Finding. Found as above stated in No. 31.

(**33**) *Request.* Bark's course was nearly opposite that of steamer.
Finding. Bark's course was N. E.; steamer's course was S. by W. ½ W., an angle of 28 degrees.

(**34a**) *Request.* Starboarding wheel and keeping on was the only way to *take the steamer away from the*

bark. Finding. The steamer starboarded and kept on full speed until her engines were reversed *just before* she struck the bark (4 & 5 F).

(**34b**) *Request.* The movements of the steamer would have avoided the collision if they had not been thwarted by the bark changing her course. *Finding.* The change of course of the bark was after the steamer's green light was seen, and the man at the wheel had *hardly* got the wheel over when the steamer struck the bark, and the change of the bark was *one or two points.* The full speed of the steamer continued up to within 100 feet of the bark (Johnson, 67, *133*) and was 11 knots an hour, or 1,111 feet in one minute. The speed of the bark was 4 knots an hour, or 404 feet in one minute. The bark was struck forward of her mizzenmast, and therefore her bow had moved over one-half of her length past the bow of the steamer at the collision. Let A, represent the point of collision; B, the bow of the steamer; C, the point on the bark's port side where the steamer struck her. Then, the distance from A, to B, will be the distance the steamer has to pass over in any given time at the rate of 1,111 feet in one minute, and the distance from A to C, the distance the bark has to pass over at the rate of 404 feet in one minute. But, as the steamer moves 11 feet to the bark's 4, the bark must be $\frac{4}{11}$ of the distance away from A, which the steamer is in order to reach A—the point of collision—at the same instant; and, if located thus—say half a minute before the collision—C, will be 202 feet from A, and B, 555 feet from A. If the bark of 282 tons was as long as the steamer of 1,715 tons—viz., 242 feet—as the point struck on the bark was aft of midships, her bow would be less than 120 feet away from A, when the steamer's bow was 555 feet away and as the change of course was after the steamer's green light was seen, and you could *not* see the length of the bark in the fog (Sherwood, 65; Brown, 39), it follows that the steamer must have been *less* than 242 feet away when the bark ~~l~~uffed, and that the bark's bow had then passed the point of collision, which must

Ans. (p. 13) says S.S. headed "about S or S by W" at collision

133) was that steamer reversed 100 feet away from the bark.

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On its face, this is not a finding of *any fact existing* in this case and does not embrace *all* she could have done, for she could have slowed and combined a careful advance with a change of wheel, or a reversal with a change of wheel, or could advance at full speed without any change of wheel.

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Finding. The Court did not find this. The contrary was proved (Johnson, 69, 138) and see page 28 of this brief.

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Finding. Bark's course was N. E.; steamer's course was S. by W. ½ W., an angle of 28 degrees.

(**34a**) *Request.* Starboarding wheel and keeping on was the only way to *take the steamer away from the*

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have happened within less than twenty seconds after that.

(**35**) *Request.* The mate of the bark was not a competent navigator. *Finding.* The bark's lights were properly set and burning. The look-out on each vessel was vigilant. Each vessel observed the proper fog signals. The mate, on seeing the green light of the steamer in the fog described, told the man at the wheel to port, and called those below to save themselves. The man at the wheel had *hardly* got the wheel over when the steamer struck the bark.

(**36**) *Request.* The change of the bark's course was *not* made *in extremis.* *Finding.* The situation as found has been detailed, and the *conclusion of law* was that the change was *in extremis.*

(**37 to 52**) *Requests* to find conclusions of law which are based upon findings which were refused need no argument.

Lastly. The appeal taken in this case is entirely unjustified, and the decree should be affirmed with costs, interest and *damages.*

As to Damages.

On March 10, 1890, over two years ago, Subdivision 4 of Rule 23 was amended so as to read:

"In cases in admiralty, *damages* and interest may be allowed if *specially* directed by the Court" (133 U. S., 711).

In **The Douro,** 3 Wall., 566, the Court said: "We cannot approve the conduct of the counsel who advised this appeal. An appeal is a matter of right, and, if prayed, must be allowed, but should never be prayed without some expectation of reversal. We impose penalties when writs of errors, merely for delay, are sued out in cases of judgments at law for damages, *and if the rule were applicable to the case before us, we should apply it.*"

The rule is now applicable.

In **Whitney vs. Cook,** 99 U. S., 607, the Court said: "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this is a proper case in which to say that hereafter more attention will be given to that subject, and *the rule enforced both according to its letter and spirit.* Parties should not be subjected to the delay of proceedings for review in this Court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked."

On November 18, 1890, the proctor for the appellees served on the proctor for the appellants the following notice (the original of which, with proof and admission of service, is filed with this brief):

SIR — Please take notice that unless the appeal herein is discontinued I shall apply to the Supreme Court, upon the hearing of this cause, for an award of ten *per cent.* (10%) of the amount of the judgment herein, as damages for delay under Rule 23 of the Supreme Court, as amended on March 10, 1890.

Dated New York, November 18, 1890.

Yours, &c.,

GEO. A. BLACK,
Proctor for Appellees.

To A. OLDRIN SALTER, ESQ.,
Proctor for Appellants.
W. H. SALTER, ESQ., and R. D. BENEDICT, ESQ.,
Of Counsel for Appellants.

The bond, on appeal herein, expressly covers *damages* and costs (107, *217*).

Respectfully submitted,

GEORGE A. BLACK,
Of Counsel for Appellees,
71 Wall St., N. Y.

April 16, 1892.

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Office Supreme Court U.S.
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JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

JOHN E. ALEXANDRE ET AL., CLAIMANTS OF THE STEAMSHIP CITY OF NEW YORK,

Appellants,

vs.

JOHN MACHAN ET AL., OWNERS OF THE BRITISH BARK HELEN,

Appellees.

BRIEF IN REPLY FOR THE BARK HELEN.

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Supreme Court of the United States.

JOHN E. ALEXANDRE ET AL., CLAIMANTS OF S. S. "CITY OF NEW YORK,"
Claimants and Appellants,

vs.

JOHN MACHAN ET AL., OWNERS OF BARK "HELEN,"
Libellants and Appellees.

BRIEF IN REPLY FOR BARK "HELEN."

Comments on Appellants' Brief.

Page 2. The statement that the fog horn of the bark was heard by the steamer exactly "*two minutes*" before the collision is made the basis of claimants' argument throughout. The finding is "about two minutes" (5th Finding). The uncertain estimate of time given by a witness in the excitement of an impending disaster is entitled to no credit except as an *unreliable estimate.*

The Alaska, 27 Fed. R., 715.
Khedive, 5 Ap. C., 886.

Page 2. That the steamer ran under her starboard helm *at least* a minute is found by the Circuit Court (5th Finding, 89, *177*), but this is a limit in one direction only—*not less*, but how much more is uncertain.

Page 2. The statement of the claim of the steamer that the bark was *coming up* the New Jersey coast on the *regular* course, N. E. by N., is in opposition to the statement that the steamer was *going down* the same coast on the *irregular* course of S. by W. one-half W. (a difference of one and a half points).

Page 2. The steamer's claim that the bark was coming up the coast N. E. by N. *(having the wind* **almost astern***)* is an important admission, and concedes that the wind was *almost* S. W. by S. (see p. 21, where this is retracted and the claim is made that the wind was south, in defiance of the finding that it was between S. W. and S. S. W., and the evidence of the signal station at Atlantic City (38, *69*).

Page 3. There was no objection or exception to Haggerty's evidence (78, *154*). The exception (at 99, *200*) is to the *opinion* of the Court, and this specification of error is unavailing to claimants.

Page 4 *d.* The statement (if so intended) that the Circuit Judge agreed with the District Judge that the bark headed E. or E. by N. at the collision is a **mis**-statement of his finding.

The Circuit Court found the bark's course was N. E., and that she changed one *(i. e.*, to N. E. by E.*)* or two points *(i. e.*, to E. N. E.*)*.

Pages 4, 5 and 6. "*Second Point.*" A labored argument to twist the word *eastward*, which is an *adverb*, into a *noun*, and make it mean "east," is presented.

Webster will not help this strained effort. He says: "**Eastward,** *adv. (east* and *ward).* Toward the east; in the *direction* of east from some point or place. New Haven lies eastward from New York. Turn your eyes *eastward.*"

Worcester says: "**Eastward,** *ad.* Towards the east."

Page 8. What was *contested* in the District Court is of no importance *now.* The *new trial* of an admiralty appeal with *new* allegations and *new* proofs wipes out the proceeding in the District Court.

The Charles Morgan, 115 United States Reports, page 75:

"A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated—*a trial in which the judgment of the court below is regarded as though it had never been rendered*" (The Hesper, 122 U. S., 266).

The persistent effort of claimant's counsel to impute *willful perjury* to the mate Taylor and to excite against him the natural prejudice of an honest mind towards a perjurer, commenced in the District Court and there successful, by reason of the inability of the District Judge to understand and make allowance for "*deviation,*" and remaining on the record through his unwillingness to *rehear* the case, was renewed and defeated in the Circuit Court, and should have there rested, if respect is to be paid to the rulings of this Court that they will not *weigh* the evidence.

Page 9. The Circuit Judge **did not** agree that the mate's story was fabricated. He says, "It may be "conceded that her mate * * * is not entitled to "any credit." What then? There was **evidence enough without considering his evidence** to establish the truth of the bark's story, and he did believe it.

Page 9. The claimant's counsel misquotes the amended libel, when he says, "there was a *deviation* "*of two points* in the bark's compass." The true allegation is "libellants believe that such deviation *on a* "*true N. E.* ½ *E. course* was two points, *so* that the

" course appeared by said bark's compasses to be E. by " N. ½ N."

The *funny* comment claimant's counsel makes (p. 10) is, " that such an error (*i. e.*, two points on a true " N. E. ½ E. course) would have made the bark head- " ing until 8:15 of the day of collision N. instead of " N. E."

Two points *westerly* deviation would make a reading of N. E. mean true N. N. E. instead of north; but, as shown on my brief (p. 10) and by the following extracts, the amount of deviation changes with each different heading of the iron ship, and generally decreases as she approaches north or south, and increases as she approaches east or west.

" Elementary Manual for Deviation of the Compass in Iron Ships," by F. J. Evans :

(Page 6.) " The 'deviation' differs in different ships. " * * * It further *varies in amount* as the ships' head " points *in various directions*, so that there is no se- " curity for the faithful performance of a compass, unless " its errors *from point to point* are recorded in a table."

Page 14. " Iron-built ships differ in these respects " materially from wood-built ships, as *each iron* vessel " has a distinctive character of its own."

" The direction of the points of *no* deviation, instead " of being near the north and south points of the com- " pass, are chiefly dependent on the direction (by com- " pass) of the ship's head and keel while building, and " are *generally* nearly in that direction. They are not, " however, always opposite to each other, nor are the " points of maximum deviation at right angles to the " point of no deviation, as usually obtains in wooden- " built ships."

Page 10. The effort to overcome the finding of the Circuit Court, that the bark's change of course was *one or two points only*, is sufficiently answered by saying that such finding is based on evidence which has not

been objected to and no *exception* taken that it was not proved, or a greater change conclusively established.

The Francis Wright, 105 U. S., 381.

Pages 11 to 16, *Fourth Point, and Pages* 16 to 19, *Fifth Point,* all present an argument based on a *misstatement.*

The pleadings in the Circuit Court presented the issues that Court dealt with, and they *squarely alleged* that "the true heading of the "bark was N. E. ½ E.," and "that when the steamer was "close upon the bark, and the impending collision in- "evitable, and, in order to escape the same, order was "given to port the bark's helm, which order was "obeyed, *but did not alter the course of said bark more* "*than a point,* and in a direction away from the said "steamer."

The finding of the direction of the wind, and the evidence, and the steamer's claim that the wind was "*almost astern*" (p. 2), **fix** the heading of the bark at N. E. or N. E. ½ E., and a change of a point from N. E., under a port helm, would make her head N. E. by E. at the collision.

Page 18. Claimants assert "*an effort* was made in "the Circuit Court to change the case of the original "libel by an amendment. The Circuit Court decided "that the proposed change had no sufficient ground."

The Circuit Court decided no such thing.

It required the amended libel to be made specific by inserting the *amount of the deviation* believed to exist in the "Helen" *on the* course of N. E. ½ E. (8, *15*).

Page 19, claimants say the Circuit Court did not find the amount of deviation as requested by libellants (82, *160),* and, from that, argue that it "leaves the *allegation* in the libel in the Circuit Court as to the heading

of the bark at the collision, *according to her compass*, just as it was in the libel in the District Court."

Such *so-called* argument is hard to answer. The *allegation* of the libel of the Circuit Court was not altered by the failure to find of the Court. The *fact* that the bark headed N. E. ½ E. is *alleged*, and the fact that she headed N. E. is *found* (3d Finding).

The libellants are successful. They cannot present exceptions or review the failure of the Circuit Court to make any finding they requested, and that the Circuit Court did not make the finding is not proof that it ought not to have done so. It may have thought the suggested finding immaterial and sufficiently covered by the findings made.

Page 20. *Seventh Point.* The changes are again rung upon "*fabrication*" and "*falsehood*" *ad nauseam.*

The "New York" was bound from New York to Havana (2d Fdg.), and the "Helen" from Havana to New York (1st Fdg.). The course of the steamer is stated to be S. by W. ½ W., and it is claimed the bark's course must have been N. N. E. ½ E. (*i. e.*, N. E. by N. ½ N.), because that is "*the usual course.*" But why was not the steamer on the *usual* course too?

The difference between S. by W. ½ W. and S. S. W. ½ W. is one point.

Captain Deakin says he passed Barnegat bearing five miles off (59, *117*), and collided where the "Helen" lies sunk (2d Fdg.). The "New York" could not reach the point of collision (passing Barnegat, bearing W., five miles off on a course of S. by W. ½ W), but would do so on a course of S. S. W. ½ W. (see chart).

Captain Deaken testified: "When Barnegat was a little abaft the beam, we headed * * * about S. by W. ½ W., *which would be our course to Body Island*" (59, *117*).

Body's Island is off North Carolina, at the junction of Albemarle and Pamlico sounds (see chart), and a line drawn from the wreck, extending five miles W. of

Barnegat is S. S. W. ¼ W., and not S. by W. ½ W. To reach Body's Island on a S. by W. ½ W. course, the steamer must start three miles *west* of Barnegat Light (or inside Barnegat Bay).

This proves that the steamer's compass was also affected by the iron of her engines, &c., and that a reading of S. by W. ½ W. meant S. S. W. ¼ W., and that the steamer's compass deviation was three-quarters of a point to the west (on that course).

Johnson (the mate of the steamer) says she headed S. by W. ½ W. *by the magnetic*, and S. by W. ¾ W. by the steering compass (68, *137*). This would be an *easterly* deviation of one-quarter point, and is *obviously* wrong.

Evans' "Manual," p. 9:

"As the ship makes a complete circle in azimuth, "**the north end** of the needle is drawn sometimes "to the *right* hand of the correct magnetic north *by* "*the attraction of the ship's iron*, and sometimes to the "*left* hand. In the former case it is called **east** de-"viation, in the latter **west** deviation."

Johnson said (67–*133*): "There was a deviation to our steering compass of about a quarter of a point westerly. The course that we were steering was S. by W. ¾ W. by the steering compass."

If the north end of the needle was drawn to the left or *west*, then the south end would be drawn to the right or *east*; and when steering S. by W. ¾ W. the true magnetic would, with one-quarter of a point of *westerly* deviation, be S. S. W.; but, as shown, the steamer must have headed S. S. W. ¼ W. to reach the point of collision, and, therefore, when her compass read S. by W. ¾ W. its south end pointed ½ point too far to the eastward, and its north end ½ point too far to the westward; and Johnson was wrong *in every aspect* when he said (68–*137*) "We were heading S. by W. ¾ W. by our steering compass; *S. by W. ½ W. by the magnetic.*

If the "New York" passed Barnegat six miles off,

then she must have headed to reach the point of collision S. S. W. $\frac{3}{4}$ W., and her deviation was 1 point; and, when the wheelsman (Baar) of the steamer with the steamer's compass before him said the bark's course was N. E. by N. (55, *109*), the correction of 1 point westerly deviation would make her true course N. E.

Page 21. Claimants say "the light*houses* were in sight at 8 P. M." This is an error. The mate and the captain saw *lights* not light*houses* at 8 to 8.15 P. M.

NOTE. In reading Taylor's evidence it must be borne in mind that he had never been on the coast before except when a boy, when he was sixteen years old (47, *89*). That it was the captain who told him it was Great Egg Harbor light (49, *92*).

Tucker's Island light (a **fixed** white light varied by red flashes, visible 12½ miles), **is another name** for Little Egg Harbor light (see chart), and when the mate testified that the light which was aft of abeam was **Great** Egg Harbor light, he evidently referred to **Little** Egg Harbor, or Tucker's Island, light.

Barnegat light is a **flashing** white light visible 19 miles, and at 8 P. M., when Taylor came on deck, he went into the mizzen cross-trees and reported a light forward of the port **beam**. This was before the bark's course had been changed to E. by N. ½ N. by her compass (true N. E. ½ E.), and when the mate came on deck she was heading *by her compass* N. E., which, allowing (on that course) one point deviation, would be N. E. by N. true; and he says that when he so reported it (forward of the port beam) the bark might have been a little off her course. Brown (lookout of bark), on duty from 8 to 10, reported the light "on the port side for-

ward of abeam" (40, *73*). The mate brought the light down with him and pointed it out to the captain, who saw it from the deck before he went below at 8:15 P. M. It was **then** *within* the 19 mile range, and he told the mate it bore N. N. E. (49, *92*), and called it Absecon light. Between 6 and 7 P. M. the mate had come on deck and had seen light*houses* on the port quarter—and this was obviously Absecon, which the bark had then passed, as Little Egg Harbor (or Tucker's Island) light was then a little forward of abeam, and Barnegat (called Absecon by the master) was not yet in sight. This is shown by the testimony that the light the mate saw from the crosstrees was *not a fixed* light (Barnegat is not a fixed light, and Absecon is).

Page 21. The *risky* suggestion is made that the mate *designedly* dropped an N. when he said his course was E. by N. ½ N., and ought to have said N. E. by N. ½ N. (a modest difference of four points to be carried through all his and the rest of the crew's testimony without trip or mistake), and that that would "give her a change of only 1½ points before collision instead of 4½ points.

The counsel here shows how easy it is to trip, for his calculation is wrong, as there is a difference of five and one-half points between E. and N. E. by N ½ N.

Page 21. The reference to our Signal Service (not "*Coast Survey*") is incomplete without adding that at Atlantic City the wind was S. W. steady at 9 and 11 P. M., increasing from thirteen to sixteen miles an hour (38, *69*).

This observation both the courts accepted.

Page 21. Claimants say they each "must have heard the other's signal *nearly* ahead." Baar (wheelsman of steamer) says he heard the bark's horn, one

and a half to two points on steamer's *starboard* bow (55, *107*), and Johnson (mate of steamer) says (66, *132*) he heard it one point on the starboard bow, and the steamer was instantly *hard a-starboarded*, which ought to have thrown her head to port, and thereby *increased* the number of points on the starboard bow, and *that it did not do so was notice that the bark was crossing the steamer's course to the eastward.*

The steamer kept up her swing to starboard *until* the bark's sails came into view, and Johnson says they then bore one point on the starboard bow, and this proves that, with all the steamer's swing to port, the bark was crossing to the eastward *at an angle large enough to prevent the port swing of the steamer increasing the starboard bearing of the bark.*

Page 22. "*Those lights told where his vessel was two hours before the collision.*"

They did indeed; and, read aright (*i. e.*, substituting the name "Barnegat" for the name "Absecom" for the *flashing* light which the mate saw ahead, and *Little* Egg Harbor, or Tucker's Island, light for *Great* Egg Harbor light for the *fixed* light [*varied* by red flashes] which the mate saw abeam), the whole story becomes consistent when the correction for deviation of the bark's compass (always in one direction, viz., *westerly*) is made.

Page 24. *(a)* Claimants' counsel distorts the expression of the Circuit Judge—"She (the steamer) had run under her starboard helm *at least* a minute before the bark was *seen*"—into *exactly* a minute, and, having thus secured a data founded in error, he proceeds to demonstrate by his diagram (p. 24½) that the steamer *saw* the bark **1,200** feet off, and *saw* her luff (for the luff of the bark was **seen** by the steamer *from its* very beginning) at 1,200 feet distance—*i. e.*, from B to Y on his diagram—and yet the Circuit Court found that the fog was so dense **"that vessels COULD NOT discover one another at a distance of one-eighth of a mile,"** *i. e.*, 760 feet (3d Finding).

Page 24 *(b).* The Court found that the change of the steamer to port (*i. e.*, easterly) under her starboard helm was three *or four* points (5th Fdg.).

Claimant's counsel is satisfied with *three* points change; four would not agree with his diagram or theory.

Page 24 *(c).* Claimant's counsel makes it appear that the bark **was seen** " 333 feet off *from the line* of the steamer on her starboard bow," *i. e.*, at Y when the steamer was at B (or 1,200 ft. distant), and gets there by ignoring the concurrent testimony of *all* his witnesses that all the fog-horns of the bark were *heard* on the steamer's *starboard* bow, for by his diagram the steamer is at A when the bark is at X (and therefore then had the bark a point on her *port* bow, as will be evident by prolonging the line *through* A in a S. by W. ½ W. direction). If A is transferred to the north and south line of the diagram and the S. by W. ½ W. course laid down through it, it is evident that at X the bark would be *right ahead*, and, to get her bearing a point on the steamer's *starboard* bow, A must be transferred 500 feet to the eastward.

Page 24. *(d)* The diagram represents the steamer heading S. by E. ½ E., and the bark E. at C, the point of collision, with the wonderful result that the angle between their courses on the bark's port side is 106¾ degrees (= 9½ points), whereas no witness on either side made it more than 82 degrees (= 7 points), and the average of the four largest is 75 degrees (see page 26 of my brief), and requires a change by the bark of *four* points *in sight* of the steamer (*i. e.*, *less* than 760 feet away from her), which would make her ~~⅓~~ 36 1/3 % of less than 760 feet away from C (*i. e.*, bark runs 400 feet while steamer runs 1,100). = 400/1100 = .36 1/3 %)

~~On the angle of claimants' diagram, of 5½ points (*i. e.*, the angle at which X Y prolonged intersects B C) the bark would be just ⅓ of 760 feet from C, for~~ If approach-

ing C head and head (*i. e.*, on the line B C prolonged), the combined speed would be 1,500 feet, of which the bark would make 400 and the steamer 1,100 feet, and $\frac{4}{15}$ of 760 feet would be 202 (*i. e.*, the bark's distance from C on the line B C prolonged and the steamer would be 557 feet from C); and if the steamer were approaching C on the line N. S., and the bark on the line W. E., she would be ~~just~~ $\frac{4}{15}$ of 760 feet from C, and the steamer $\frac{11}{15}$ of 760 feet from C, for they each reach C at the same instant, and the angle between them is constant.

Then, as the bark is only 202 feet from C, she is required by claimant's theory to change four points in 202 feet, while it took 1,100 feet for the steamer to change three points—an absurd conclusion—for it would make the bark turn completely round in running 3200 ~~1666~~ feet, while the steamer takes 10,666 feet (p. 24 of claimant's brief), and take the bark eight minutes to do what it takes the steamer ten minutes.

Page 25. *(a)* The claimant assumes that the steamer is at A, while the bark is at X, and therefore *on the port bow of the steamer* instead of her starboard bow, and yet he says "any possible variation of the "barks course *consistent* with her being still on "the steamer's **starboard** bow could not affect the "question." The *consistency* is absent from his diagram.

Page 25. *(b)* The claimant says that the steamers swing to starboard was stopped by the *discovery* of the bark's change of course, and such discovery could not have been before the bark was **seen** *less* than 760 feet from the steamer, and less that 202 feet from C, and consequently when the steamer was *less* than 557 feet from C, or just about one-half the distance from B to C on the diagram, and therefore half the angular distance from C to D, which demonstrates that, before the stern of the steamer (242 ft. long) got by the bow of the bark, the bark would on a course of N. E. (*i. e.*, X Y prolonged) have run the steamer down.

See claimants' 13th request to find (86) where they say: "This change of the bark's course **was seen as soon as it was made.**"

Page 26. The claimant *assumes* that the mate had a right to *assume* that the vessel whose foghorn he heard was on a *supposed* course, which course might depend upon the direction of the wind, which the mate *assumed* to be S., when it was in fact S. W. or S. S. W. (3d Fdg.), and thereupon asserts that the mate "had a right to judge that the vessel whose horn he heard was on a course of about N. E." *If he had so judged, he would have known that the bark was crossing his bow from starboard to port*, and that every degree of swing to port *increased* the danger of collision. But he says he *judged* she was standing *opposite* to his course (67, *134*), and counsel's assumption falls to the ground.

Page 27. The criticism of the Circuit Judge's opinion is unfair. It leaves out the *idea of fog*, which is the controlling "*motive*" of the Judge's statement.

But, independent of fog, the law *compels* a *steamship*, when *approaching* a sailing vessel, *so as to involve* **risk** *of collision*, to slacken her speed (Rule 21). And there was obvious risk of collision until the bark's position and course were *actually* known.

Page 27. Claimant's counsel says the mate was compelled to choose *whether* he would slacken his speed or change his course.

He *could* do both. The law directed him *imperatively* to go at a moderate speed in the fog (Rule 21), and did not *direct* him to change his course.

Page 29. The claimants' counsel says: "If the "mate had deemed it *safer* to avoid the collision by "stopping and reversing, he *could* have brought his "vessel to a standstill before reaching the bark."

The law directs the precautions which the mate should have taken, and told him what was *safe* without leaving the mate to determine whether there was something *safer*.

Page 29. The statement that the wind was from the *south* is made in defiance of the finding of the Circuit Court, and contradicts the claimant's statement on page 2 that the bark was heading N. E. by N., with the wind almost astern.

Such shifting of position by counsel shows the desperate straits of his case. The mate did not judge the bark's course was N. E. by N., but that it was *opposite* his own course S. by W. ½ W., which is N. by E. ½ E. *(a difference of* 1½ *points* instead of no difference), and neither Court judged the bark's course was what the mate judged it.

Page 30. To uphold the doctrine contended for by claimant's counsel in his *Tenth Point* the Court must overrule all its cases which hold that when the law says to a steamship, keep out of the way of a sailing vessel, it means just what it says (Rule 20), and raises a presumption of fault against the steamship (see my brief, p. 31).

Page 31. The Margaret–Cayzer vs. Carron Co., cited by claimant's counsel from 5 Asp., is also reported in 9 Ap. C., 873, and was a collision between **two steamships** (p. 873).

The presumption of fault in the steamship puts upon her the *burden of showing* that she was in no degree in fault, and that the sailing vessel was solely in fault, and she has done neither, and **the findings of the Circuit Court establish that the bark was wholly free from fault.**

November 17, 1892.

Respectfully submitted,

GEO. A. BLACK,

Of Counsel for Bark "Helen," &c.,

44 Pine Street,

New York.

FILED.
MAR 18 1893
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

JOHN E. ALEXANDRE ET AL., Executors of Francis Alexandre, deceased, Claimants of the Steamship "City of New York,"
Appellants,

against

JOHN MACHAN ET AL., Owners of the Bark "Helen," &c.,
Appellees.

MOTION PAPERS.

GEO. A. BLACK,
Proctor for Owners of Bark "Helen,"
44 PINE STREET,
New York City.

C. G. Burgoyne, Walker and Centre Streets, New York.

SUPREME COURT OF THE UNITED STATES,

JOHN E. ALEXANDRE ET AL., Executors of Francis Alexandre, deceased, claimants of the steamship "City of New York,"
Appellants.

AGAINST

JOHN MACHAN ET AL., owners of the bark "Helen," &c.,
Appellees.

Please take notice that, upon the papers herewith served upon you, I shall move this Court, at the opening thereof on the 20th day of March, 1893, at the Capitol in the City of Washington, for an amendment of its decree for affirmance herein by allowing libellants interest and damages.

Dated February 17th, 1893.

GEO. A. BLACK,
Proctor for Appellees.

To A. O. SALTER, ESQ.,
WILLIAM H. SALTER, ESQ.,
R. D. BENEDICT, ESQ.,
Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

JOHN E. ALEXANDRE ET AL., Executors of Francis Alexandre, deceased, claimants of the steamship "City of New York," Appellants. AGAINST JOHN MACHAN ET AL., owners of the bark "Helen," &c. Appellees.	No. 61, October Term, 1892.

And now comes George A. Black, proctor for John Machan *et al.*, libellants and appellees, and moves this Court that the decree of this Court affirming the decree of the Circuit Court herein with costs, **but without interest,** be modified, by allowing interest and damages, and bases his said motion upon the transcript of the record herein and the affidavits and certificates hereto annexed and brief herewith presented, and moves for such other and further relief as may be just.

GEO. A. BLACK,
Of Counsel for Appellees,
44 Pine Street, New York City.

SUPREME COURT OF THE UNITED STATES.

No. 61, October Term, 1892.

John E. Alexandre, J. Joseph Alexandre and J. Henry Alexandre, Executors of Francis Alexandre, deceased, *et al.*, claimants of the American steamship "City of New York," her engines, &c.,
Appellants,

vs.

John Machan *et al.*, owners of the British bark "Helen," &c.,

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs, but without interest.

Per Mr. Justice Brown.

January 3, 1893.

SUPREME COURT OF THE UNITED STATES.

JOHN E. ALEXANDRE ET AL., Executors of Francis Alexandre, deceased, claimants of the steamship "City of New York,"

Appellants,

AGAINST

JOHN MACHAN ET AL., owners of the bark "Helen," &c.

SOUTHERN DISTRICT OF NEW YORK, SS. :

GEORGE A. BLACK, being duly sworn, says that the deposition of Henry Dawson, of which a copy is *hereto annexed*, was taken as further proofs on the part of libellants on their appeal to the Circuit Court on December 9th, 1886, and was read in evidence on the trial of said appeal, in said Court, before Judge WALLACE, on October 25th, 1887, and received and considered by him, as appears by his *certificate* hereto annexed. That, when the appellants in this case prepared and served their proposed bill of exceptions, deponent, as proctor for appellees, proposed as an amendment to the said bill of exceptions, to take in the deposition of said Henry Dawson and of other witnessnes, and that the Circuit Judge before whom the said appeal was tried, in settling the said bill of exceptions, struck out the whole of the testimony of said Henry Dawson, and also of Charles F. Heyn and David F. van Cleaf; that **there was no evidence given on the trial of said appeal to contradict or dispute the evidence of said Dawson,** and that, on the trial of said appeal, deponent, as proctor for the libellants,

asked the said Court to make the finding numbered "five," which appears at page 82 of the record *(160)* as follows:

"FIFTH. The bark being an iron vessel, *her com-*
"*passes* were affected by that fact, and she had on board
"*a deviation card* on which was noted the *deviation* of
"the compass caused by the *iron* of the vessel. She
"had met with a breeze of wind when off Hatteras,
"which had caused her cargo to shift and *gave the vessel*
"*a list* to starboard and caused what is technically
"called the '*heeling error.*' The wind *appeared* to
"those on board the bark by her compass to be W.
"S. W., and her course *appeared* by the same compass
"to be E. by N., ½ N. The *true heading* of the bark
"was N. E., ½ E., and the *true direction* of the wind
"was S. W.

And deponent further says that the Circuit Judge found that the bark was an *iron* vessel and that she headed N. E.; that the *true* direction of the wind was between S. W. and S. S. W. (1st finding, p. 88 fol. *77*, 3rd finding, p. 88, fol. *75*).

That the said Circuit Judge failed to make *any finding* as to there being a *deviation* card on board, or as to the *list* to starboard of the bark, or as to the *effect of the iron on her compass* or as to the effect of the list causing the "*heeling error*," or as to the direction in which the wind *appeared* to be to those on the bark *by her compasses*, or as to what her course *appeared* to be by the *same compass*. All of these facts were proved by uncontradicted evidence, and appear on the record herein as follows:

(1) As to the list to starboard at p. 45, fol. *85*.

(2) As to the deviation card at p. 40, fol. *91*.

(3) As to the observed direction of the wind by the bark's compass being W. S. W. at p. 46, fol. 86.

(4) As to the apparent heading by the bark's compass being E. by N., ½ N. at p. 46, fol. 84.

And deponent further says *that the Circuit Court having decreed for the libellants a full recovery herein,*

there was no ground for an appeal by said libellants therefrom, nor any reason why they should, nor any practice in admiralty permitting them to take **an exception** *to the refusal of the Circuit Judge to find as requested,* although such facts were proved by *uncontradicted* evidence ; and if such finding had been made, as a *necessary inference* therefrom, this Court must have found that the story of the mate of the bark, as to her course by her compass and the apparent direction of the wind, was true, corroborated, as it was, by her wheelsman Brown ; and that if such finding had been made, deponent believes that the appellants in this case would not have appealed to this Court, nor delayed the libellants, as they have done for over four years in the collection of the Circuit Court decree, which this Court has now determined was rightfully made.

Deponent further says that on the trial of the appeal in the Circuit Court, he furnished to and *left* with Judge WALLACE a copy of " Evans' Elementary Manual for Deviations of the Compass in Iron Ships " and in addition to *reading* therefrom, *printed* extracts therefrom in his *original* brief, at p. 13 thereof, as follows :

Evans, p. 6—" **Deviations** differ in different " ships * * * It further varies in amount as the " ship's head points in various directions, so that there is " no security for the faithful performance of a compass " *unless its* **errors** *from point to point are recorded* in " a table." " **Each** *iron* vessel has a distinctive " character of her own. The direction of the point of " *no deviation,* instead of being the north and south " points of the compass, are chiefly dependent on the " direction by compass of the ship's head and keel " while building ; they are not however always opposite " to each other, nor are the points of maximum " deviation at right angles to points of no deviation."

Id. p. 89—" The deviations heretofore described have " been **for vessels in an UPRIGHT position,** " but as it has been found by experience that *when the*

" *ship heels over* further large deviations are produced, " it is necessary that seamen should be acquainted with " *the laws* of this remarkable disturbance."

Deponent further says he extracted in the same brief at p. 14 from Towson's " Practical Information on " the Deviations of the Compass for the Use of Masters " and Mates of *Iron* Ships," p. 17, sec. 24; p. 35, sec. 66, and p. 39, sec. 67; where the author says: " A " table of errors, however correctly determined, *is of no* " *value* if the ship *heel over*, unless allowance be made " for the disturbance thus occasioned," and p. 41, sec. 69, where the same author says, " In some " cases the deviation *from heeling* has amounted to *as* " *much as two degrees for each degree of heel of the ship*," and that said *work* was produced before and read to the Circuit Court on said appeal.

Deponent further says that on the argument in this Court he read to this Court and put on the foot of page 9 of his brief a reference to sections 32, 38, 47, and asked this Court to add section 330 of Bowditch's Navigator (Ed. 1891), a work published by the U. S. Government for the use of navigators, and that extracts from said sections are annexed.

Deponent further says that on said argument he called the attention of this Court to the fact that on Nov. 10th, 1890, the appellants (Alexandre) had moved this Court to remand the record herein to the Circuit Court, to the end that they might there move that Court to allow them to file amended exceptions *nunc pro tunc*, and that deponent had opposed said motion on an affidavit showing how the " Bill of Exceptions " had been made up, and how the evidence of Henry Dawson (herewith submitted) and other evidence given on the trial of said appeal had been inserted by libellants as a proposed amendment to said proposed bill, and how the Circuit Judge had not allowed such amendment, and that deponent had not insisted on his right thereto, *inasmuch as there was no exception to the findings as against evidence, or without evidence*, and that

this Court on Nov. 17th, 1890, had denied the said motion. A copy of this Court's order thereon is hereto annexed.

Deponent further says that after the opinion of the United States District Court, on the trial of this cause in that Court (reported in 15 F. R., 624) had been handed down, deponent moved said District Court for a rehearing, and on such motion presented the depositions of Charles F. Heyn, David F. van Cleaf, Minnie C. Austin and Lars Larson; and also presented and read to said Court extracts from "Evans Manual" and the "Mathematical Theory of the Deviation of the Compass," by Commander Howell, published by the United States Government for the use of the naval cadets at Annapolis, and other works on the same subject, and that Court thereafter made the order which was certified to the Circuit Court in the Apostles herein, and of which a copy, certified by the Clerk of said Circuit Court, is annexed. That deponent prepared and submitted to the District Judge for settlement the said order and inserted therein the following words:

"and the counsel for the libellants producing and re-
"ferring to various books of authority on the subject
"of the deviation of the compass in iron ships, and
"commented thereon,"

and that the said District Judge struck those words out of such order before signing it.

Deponent further says that annexed hereto is the certificate of Hon. ADDISON BROWN, Judge of said District Court, who signed said order, showing that the reason he had for striking out said words was that he deemed them unnecessary.

GEO. A. BLACK.

Sworn to before me this 17th day of February, 1893.

LAWRENCE KNEELAND,
Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

[SEAL.]

SUPREME COURT OF THE UNITED STATES.

JOHN F. ALEXANDRE ET AL.,
Claimants and Appellants,
vs.
JOHN MACHAN ET AL.,
Libellants and Appellees.

I, WM. J. WALLACE, Judge of the Circuit Court of the United States for the Second Circuit, hereby certify:

That on the trial of the above cause before me in the Circuit Court of the United States for the Southern District of New York, on the appeal of both libellants and claimants from the decree of the District Court, which trial occurred on October 25th and 26th, 1887, the libellants read, as further proofs on their appeal, the deposition of Henry Dawson, hereto annexed, and that I received and considered said deposition. I further certify that libellants read to me on said trial extracts from a book called Evan's "Elementary Manual for Deviations of the Compass in Iron Ships," and left with me a copy of said work, which I used and considered on said cause. I further certify that the reason why I made no finding as to the "deviation" of the compasses of the "Bark Helen" was because I did not deem such finding material, after I had found what her course was.

Dated February 15th, 1893.

WM. J. WALLACE,
Circuit Judge.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN MACHAN ET AL.,
Libellants and Appellants,

AGAINST

The Steamship "CITY OF NEW YORK," her Engines, etc., FRANCIS ALEXANDRE ET AL.,
Claimants and Appellees.

It is hereby stipulated that the deposition of Henry Dawson, a witness on behalf of the libellants, may be taken before a notary at the office of George A. Black, 71 Wall street, in the City of New York, at 10 o'clock in the forenoon ; testimony taken by a stenographer and stenographer's notes signed by the witness ; the deposition when written out to be read on the trial of this cause subject to all legal objections except as to form and manner of taking. Stenographer's fees to be taxed by the libellant if successful. Filing waived. Copy to be furnished.

A. O. SALTER,
Proctor for Claimants,
By R. D. B.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN MACHAN ET AL.,
Libellants and Appellants,

AGAINST

The Steamship "CITY OF NEW YORK," her Engines, etc., FRANCIS ALEXANDRE ET AL.,
Claimants and Appellees.

Depositions on behalf of libellants, taken pursuant to the annexed stipulation, Thursday, December 9, 1886, at the office of George A. Black, libellants' proctor, 71 Wall street, New York City.

APPEARANCES :

GEORGE A. BLACK, ESQ., proctor for libellants.
ROBERT D. BENEDICT, ESQ., of counsel for claimants.

HENRY DAWSON, being duly sworn as a witness on behalf of libellants and appellants, deposes and says :

BY MR. BLACK : Q. What is your residence, occupation and age ?

A. I reside at Liverpool ; occupation, master mariner ; 28 years old.

Q. How long have you been master mariner ?

A. Five years and a half.

Q. How long have you followed the sea ?

A. Fourteen years.

Q. Do you hold a certificate from the Board of Trade as master mariner ?

A. Yes, sir.

A. And have held it for how long ?

A. For six years.

Q. Prior to becoming master mariner, what grades did you go through ?

A. Through all grades—apprenticeship and all the grades of an officer.

Q. Did you ever study navigation or any of the theories of the compass ?

A. Yes ; thoroughly.

Q. What vessel are you now in command of ?

A. The steamship " Portia."

Q. A British vessel ?

A. A British vessel belonging to Liverpool.

Q. When do you expect to sail ?

A. On Saturday, the day after to-morrow.

Q. What other vessel beside the steamship " Portia " have you commanded ?

A. Only one vessel, the " May Corey ;" she was a wooden vessel.

Q. How long have you commanded the " Portia ?"

A. Two years.

Q. What is the " Portia ?"

A. The " Portia " is an iron steamer.

Q. Have you ever sailed in other iron steamers ?

A. In other iron steamers, yes.

Q. Do you remember their names ?

A. Yes ; the " Adirondack," the " Julia," and the " Maulkins Tower."

Q. What grade did you hold on those vessels ?

A. Different grades, from third officer to first.

Q. Have you ever sailed on iron sailing vessels ?

A. Yes.

Q. Do you remember their names ?

A. Yes ; the " Ophelia " and " Viola."

Q. What grade did you hold on them ?

A. All grades, from apprentice to first officer.

Q. About what were the sizes of those iron sailing vessels ?

A. One, the "Viola," was 700 tons, and the "Ophelia" was 1,200 tons.

Q. Do you know of the existence on iron vessels of anything or cause affecting the compass?

A. Yes.

Q. What is that?

A. The compass is affected by the deviation in iron ships.

Q. Have you observed that effect in some or in all iron vessels that you have been on?

A. In all iron vessels.

Q. Is it the same or is it different on different vessels?

A. Different.

Q. In your experience, if a vessel is on either the port or starboard tack, so that she has a list, is any effect produced by that list upon the compass?

A. Yes; a very considerable effect sometimes.

Q. Is any name given to that?

A. That is termed the heeling error.

Q. What is the extent to which you have observed that effect? Say for five degrees of list, what is the extent of the alteration on the compass by that list or heeling error?

A. It might amount to 10 degrees.

Q. And for 20 degrees of list, what would be your observation as to the effect on the compass?

A. It might amount to double the amount of list; perhaps 40 degrees.

Q. Now, when you take charge of an iron vessel of any kind, is there anything furnished you by which the deviation of the compass is to be corrected?

A. Yes; we are generally furnished with deviation cards.

Q. Have you such a card on the steamer you are now on board of?

A. Yes.

Q. Will you please produce it?

The witness produces the card.

Q. Can you leave that card with us to use in evidence?

A. Yes; I can, provided I have a copy.

The card is offered in evidence and marked "Exhibit A, December 9, 1886. S. H. O."

Exhibit A, December 9, 1886, S. H. O.

JAMES MORTON,

Adjuster of Compasses in Iron Ships, Steamships, &c.

Sunderland, So. Shields & Cardiff.

Card of Corrected Courses of After Compass, S. S. "Portia," Port of Liverpool. Adjusted by M. Mason, 5 Sept., 1884:

For Magnetic	Steer	For Magnetic	Steer
North.	½ West	South.	½ West
N by E	¾ North	S by W	½ West
NNE	1 Point North	SSW	½ West
NE by N	1¼ Point North	SW by S	¼ West
N.E.	1½ Point North	S.W.	¼ West
NE by E	1¾ Point North	SW by W	¼ West
ENE	1¼ Point North	WSW	½ West
E by N	1 Point North	W by S	¾ West
East	½ North	West.	1 Point North
E by S	----------	W by N	1 Point North
ESE	½ South	WNW	1 Point North
SE by E	1 Point South	NW by W	1¼ Point North
S.E.	1¼ Point South	N.W.	1¼ Point North
SE by S	1¼ Point South	NW by N	1 Point North
SSE	1 Point South	NNW	½ North
S by E	¾ South	N by W	----------

Objected to as immaterial.

Q. Do you know by what method those deviations cards are prepared?

A. Yes.

Q. Describe the method?

A. The ship is swung by a compass adjuster, who takes observations on different points of the compass; he works them out and determines the amount of error on each point of the compass, and forms his deviation card from that on all points of the compass.

Q. By "swinging," do you mean the vessel is turned around so that she heads at different points?

A. Exactly.

Q. As to each heading there is comparison of the ship's compass by what?

A. By bearings; by what we call reciprocal bearings; by the bearings of any known objects.

Q. That is, by the bearings of some objects on shore?

A. Some objects on shore; yes.

Q. Then the adjuster has a shore compass by which he gets the bearings of some objects which are fixed?

A. Yes.

Q. And then, when he swings the ship, he compares the bearings of these objects and the known bearings of those objects with the heading as read by the ship's compass?

A. Exactly.

Q. And the card is construtced from those changes and alterations and the difference?

A. Yes.

Q. Do you know, in your experience on sailing vessels and on steamships, whether the deviation amounts to the same on different courses? That is, is it a constant quantity?

A. No, it is not; it alters.

Q. If a vessel is heading east, will it have the same deviation when she is heading west?

A. No; in fact it is more likely to be quite the reverse.

Q. What is the deviation called when the north pole of the compass is drawn to the westward?

A. That is called westerly deviation.

Q. And when it is drawn to the eastward?

A. Easterly deviation.

Q. On what courses, independent of the heeling error is the deviation usually the greatest? On easterly and westerly or on northerly and southerly?

A. On easterly and westerly.

Q. And diminishes as you approach to the north or south?

A. Mostly towards the Equator.

Q. I mean, when the ship's head is turned to the north, is the deviation, if she has been on a westerly course, increased or diminished as she approaches to the north?

A. Generally diminished, but not necessarily so.

Q. In other vessels that you have been on besides this steamship "Portia," have you noticed whether the deviation was the same in amount as it is on the "Portia," or did it vary, as compared with hers, either more or less?

A. It varies; it varies both in direction and quantity.

Q. So that in another vessel, if you were told that she was heading by her ship's compass east by north, could you by any known method, except by experience and being on board of that vessel, determine with any accuracy what her course was?

A. Not at all, without I had the table of deviations.

Q. Of that particular vessel?

A. Of that particular vessel.

Q. And if, in addition to the effect of the deviation you were told that the vessel had a list, could you then judge any more accurately what her true heading was when she was heading on an east by north course?

A. No; I could not.

Q. Does the heeling error tend to correct the deviation or to increase the deviation?

A. It does both; it may correct it; it may increase it or it may counteract it.

Q. Depending upon what?

A. Depending on the way the deviation is, easterly or westerly, and the way the ship heels.

Q. Then each vessel, you mean to say, has its own peculiarities in that respect?

A. Exactly; they are quite different.

Q. Have you ever heard of the difference which is produced in the deviation of a vessel whether she is built heading north or heading south or heading east or heading west, when she is lying on the stocks?

A. Yes; that has a very marked effect upon the deviation.

Q. And it varies according to the direction the vessel was lying at the time she was built?

A. Yes.

Q. Does the cargo a vessel carries affect the compasses?

A. Very often.

Q. And is that effect also noticeable on the standard compass?

A. Yes; on all compasses.

Q. If a vessel is sailing for a length of time in one particular direction, say to east or east by north, does that have any effect upon the magnetism of the vessel so as to affect the compass?

A. Yes; it does.

Q. So that, when you changed to go west, what do you observe?

A. Very often a great amount of deviation—an unusual amount.

Q. And does that continue all the while you are going west, or does it diminish?

A. It generally diminishes after being on that course some time.

Q. Now, what method do navigators use to keep track of the eccentricities of the compass?

A. By observations taken from time to time.

Q. What kind of observations?

A. Observations taken by azimuth.

Q. By the sun?

A. By the sun or fixed stars.

Q. And in taking an azimuth, what time of the day is usually taken? Is it the rising sun or the sun in the meridian or the setting sun?

A. The sun rising or setting.

Q. You have got to get it nearly on the horizon in order to take an azimuth?

A. No; not necessarily at all; when the sun is on the horizon that is another observation termed an amplitude.

Q. And that is used also?

A. That is used also.

Q. And observations you take when?

A. Somewhere between the rising and the setting.

Q. And that is true as to stars?

A. The same applies to fixed stars.

Q. And to those that have transits, do you observe them as well?

A. No; not for deviation.

No Cross-examination.

Henry Dawson.

Sworn to before me December 9, 1886.

Lawrence Kneeland,
Notary Public,
Kings Co.
Cert. filed in N. Y. Co.

SUPREME COURT OF THE UNITED STATES.

No. 812, October Term, 1890.

John E. Alexandre et al., Executors, &c., *et al.*,
Appellants,
vs.
John Machan et al.

On consideration of the motion to remand this cause and the record therein to the Circuit Court of the United States for the Southern District of New York, and of the argument of counsel thereupon had, as well in support of as against the same:

It is now here ordered by the Court that said motion be, and the same is hereby, denied.

November 17, 1890.

Extracts from the "American Practical Navigator," by Nathaniel Bowditch, LL. D.; revised by order of the Bureau of Navigation—Navy Department—Washington: Government Printing Office, 1891.

Art. 32. There is probably no fact so evident to the seaman or navigator as this: **that the compass does not on its face tell the truths which its readings would apparently indicate.** And, further, there is no subject which merits more diligent and careful study than this one of the compass error. * * *

There are three causes which produce error in the compass—named Local Attraction, Variation and **Deviation.**

Art. 38. The **Deviation** is the error of the compass caused by attraction of the iron of the ship, and depends upon the quantity, the kind of iron, and its

position with respect to the needle. It is named *easterly* or *westerly* accordingly as the north point of the needle is drawn to the eastward or westward of magnetic north. * * *

It must, however, be understood that this represents but a particular case; for the iron of a ship may be, and in all iron ships is, differently disposed.

Art. 47. Heeling Deviations.—Before proceeding to describe the methods of ascertaining the deviation of the compass, attention must be directed to the fact that deviation thus found is with the ship upon an even keel. Although in wooden ships the alteration of deviation in heeling is slight, it assumes serious proportions *in iron* built ships; therefore, to be considered when the ship heels under sail, or is rolling heavily. This variation should frequently be observed for given degrees of heel, bearing of ship's head, and the tack upon which the ship is sailing at the time. The general rule is that this alteration is at its minimum when the ship's head is east or west by compass, at its maximum when the ship's head is north or south by compass; and in northern latitudes the north end of the needle is generally drawn to the weather side.

Art. 330. Swinging Ship at Sea.—The method of Time Azimuths affords a convenient and reliable manner of ascertaining the deviation of the compass at sea for different headings of the ship. Since the opportunity can be chosen, the sun should be the body selected for the observations; it should be low in altitude, and, if possible, when the hour angle is greater than 4^h.

Having a fine day and a smooth sea, either steam or sail the ship around, steadying her a minute or two on each heading, in order to allow the compass-card to come to rest. Take the bearing of the sun's centre on each heading, noting the time, also noting the corresponding headings with the steering compasses and the angle of heel. This may be done for every point of the compass, every other point, or every fourth point, as

deemed desirable. The same may be done when in sight of any prominent point of land whose true bearing can be established.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Post Office Building, in the City of New York, on the 7th day of November, 1883.

Present—Hon. Addison Brown, District Judge.

John Machan et al.

against

The Steamship "City of New York."

An order to show cause having been made herein on the day of September, 1883, requiring the claimants to show cause why a rehearing of this cause should not be had, and the depositions of Charles F. Heyn and David F. van Cleaf having been taken, and the log-book of the "Ada F. Crosby" having been produced and identified in pursuance of the terms of said order to show cause, and the depositions of Minnie C. Austin and Lars Larson having also been taken by consent as if they had been named in the said order to show cause, and said motion on said order to show cause having come on to be heard, and having been argued by George A. Black, of counsel for libellants, and by Robert D. Benedict, of counsel for the claimants, and the said depositions and log having been

read or offered to be read under objection of claimants' counsel,

It is now ordered, that the said motion for a rehearing of the cause be, and the same is hereby, denied, on the ground that the libellants herein have a right to appeal to the Circuit Court, wherein the said matters may be considered and determined without prejudice, and for that reason only, and that in denying this motion it does not pass upon the merits or admissibility of the evidence so presented as affecting the cause.

And it is further ordered, that the said depositions and the said log may be filed as evidence taken in this Court, and may be included in the Apostles herein should an appeal intervene, and may be offered in evidence on such appeal with the like effect as if they had been taken before or on the trial of this cause, but subject to all legal objections to such testimony, or any part thereof, save as to the time and manner of taking.

ADDISON BROWN.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN MACHAN ET AL.,
Libellants and Appellants,

vs.

The Steamship "CITY OF NEW YORK," her engines, &c., FRANCIS ALEXANDRE ET AL.,
Claimants and Appellants.

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a true and correct copy of a copy of an order which forms a part of the Apostles in the above-entitled cause, which said Apostles were certified by the Clerk of the District Court of the United States for the Southern District of New York, and were filed in my office on the fourth day of November, A. D. 1886, and still remain on file and of record in said office.

I further certify that the depositions mentioned in said order, viz., the depositions of Charles F. Heyn, David F. van Cleaf, Minnie C. Austin and Lars Larson, form a part of said Apostles so certified by said Clerk.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this twentieth day of January, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of these United States the one hundred and seventeenth.

[SEAL.]

JOHN A. SHIELDS,
Clerk.

U. S. SUPREME COURT.

ALEXANDRE

vs.

JOHN MACHAN ET AL.

I, ADDISON BROWN, Judge of the District Court of the United States for the Southern District of New York, do hereby certify:

That in the order of said District Court denying the motion of libellants for a rehearing bearing date in its caption Nov. 7, 1883, as proposed by libellants, appear the words, immediately after the sentence "and the "said depositions and log having been read, or offered "to be read, under objection of claimant's counsel," as follows:

"And the counsel for the libellants producing and "referring to various books of authority on the subject "of the deviation of the compass in iron ships and "commented thereon."

And that in settling said order I struck out said last recited words therefrom.

I further certify, that, although I have no distinct recollection of the fact of the production of said books, so as above recited, yet I have no doubt that they were so produced, and that the order as proposed recited correctly what actually occurred in respect thereto, and that said words were stricken out as unnecessary.

ADDISON BROWN.

U. S. SUPREME COURT.

ALEXANDRE

vs.

JOHN MACHAN ET AL.

I, ADDISON BROWN, Judge of the District Court of the United States for the Southern District of New York, do hereby certify:

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ADDISON BROWN.

FILED
MAR 18 1893
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

JOHN E. ALEXANDRE ET AL., Executors of Francis Alexandre, deceased, Claimants of the Steamship "City of New York,"
Claimants and Appellants,

against

JOHN MACHAN ET AL., Owners of the Bark "Helen," &c.,
Libellants and Appellees.

BRIEF FOR LIBELLANTS (APPELLEES) IN SUPPORT OF THEIR MOTION TO ALLOW INTEREST AND DAMAGES.

GEO. A. BLACK,
Of Counsel for Bark "Helen,"
44 PINE STREET,
New York City.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States.

JOHN E. ALEXANDRE ET AL., Executors of Francis Alexandre, deceased, claimants of the Steamship "City of New York,"
Claimants and Appellants,

AGAINST

JOHN MACHAN ET AL., Owners of the Bark "Helen," &c.,
Libellants and Appellees.

Brief for libellants (appellees) in support of their motion to allow interest and damages.

The question of the right of the libellants to *interest* on the decree of the Circuit Court has never been discussed in this case.

By *not* allowing interest it would appear that this Court must have felt some dissatisfaction with the decree of the Circuit Court in favor of the libellants.

Inasmuch as no question has ever been made as to the amount of the damages, either in the exceptions filed by the appellants or in their brief, or on the argument, and not a line of evidence to show how the amount was arrived at was inserted in the bill of exceptions, and, as it is expressly stated by this Court in its opinion, that "the sixth finding relates only to damages, and is unimportant," the only conceivable reason

why *interest* is not given to the successful party must be because this Court entertains some *latent* doubt as to the *justice* of the libellants' claim, although the correctness of the *amounts* awarded is not disputed.

Inasmuch as the libellants have never had an opportunity, or occasion, to appeal, and inasmuch as the decree of the Circuit Court was in their favor for the full amount of their damages with interest, it would seem as if depriving them of interest **for a period of over four years, without assigning any reason therefor,** and without hearing what they could say in support of their right to such interest, is working them an unintentional injustice.

Interest, in modern times, is regarded as a **right** flowing from the wrongful detention of a just claim.

Dana vs. Fielder, 12 N. Y. 40: "The party is "entitled, on the day of performance, to the property "agreed to be delivered, and if it is not delivered the "law gives, as a measure of compensation *then* due, the "difference between the contract and market prices. "If he is not also entitled to interest from *that time*, as "matter of law, this contradictory result follows, **that "while an indemnity is professedly given, "the law adopts such a mode of ascertain-"ing its amount that the longer a party is "delayed in obtaining it the greater shall "its inadequacy become.**"

In the **Bleinheim,** 18 F. R., 47, C. C. D. Mass., Judge LOWELL allowed interest in an admiralty *appeal* upon the *amount of the District Court decree* (including the interest given by that Court), and said: "I am of "opinion that the practice here has been and is *sound*— "to award interest on a *whole decree*—unless the cir-"cumstances of the case give rise to a variation upon "the grounds of justice and equity."

"Lord STOWELL twice decided that it is a just rule "to allow *interest upon interest* in cases substantially "like this" (The Driver, 5 Rob., 405; The Dundee, 2 Hag., 137).

"The latter decision is cited with approval by "CLIFFORD, J., in The Wanata, 95 U. S., 613. * *Interest* "*is given for delay in satisfying the decree,* not as a "part of the original damages. For instance, the "considerable bill of costs in this case † is made up "almost wholly of cash paid out by libellants before "the decree was rendered. Why should they not have "*interest* for the delay in repaying it? Again, if the "decree had simply remained unexecuted in the "District Court, no appeal being taken, the whole "decree must be paid with *interest*, such is the "command of the writ of execution in that Court. "*Why should the libellants,* **in addition to the "necessary expense of the appeal,** *lose a* "*part of the benefit of the decree?* In this case *the* "*damages were computed with as much accuracy in* "*regard to positive value as if it had been an action of* "*contract.* In cases of that sort I understand the "general rule to be that interest should be allowed on "the verdict or the judgment; at least, when the delay "has been caused by the act of the defendant."

Perkins vs. Fourniquet, 14 How., 328; *In re* European Cent. R. R. Co., 4 Ch. Div., 33; 2d Sedg. Dam., 7th Ed., 194; 1st Suth. Dam., 711.

In the "**Umbria,**" in the Circuit Court of Appeals for the Second Circuit (decided December 13, 1892), that Court gave interest on the *whole* amount of the decree of the District Court, on an affimance of that decree, thereby giving interest on interest, and expressly approved the "Blenheim."

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* "Interest in such cases" (says Judge CLIFFORD) "is allowed as well as costs, and, in case of appeal, the interest is cast upon the whole amount of the decree in the Court below, including the costs as well as the amonnt of damage."

† In the Machan case the costs amounted to over $1,000 (p. 104, fol. *210*), nearly all of which was disbursements for clerk's fee, for commissioner's fees and printing.

No just reason *has been shown* to this Court why interest should not be allowed to the libellants.

The libellants had no opportunity to show any errors of the Circuit Court in refusing to make findings, which findings, if made, would have disabused the mind of this Court of any *prejudice* arising out of the case as presented by the appeal of the claimants (Alexandre), and until they have had such an opportunity **it is manifestly unfair** on any mere supposition that they are in any degree in fault, *without an opportunity to clear themselves of that supposed fault*, to deprive them of any part of the recovery which the affirmance of the Circuit Court decree ought to give them.

Since this Court had been deprived of the right to *review the facts*, it ought to refuse to *draw inferences* from the testimony, unfavorable to the successful party below, and inasmuch as its judicial functions are satisfied when it has ascertained that the findings of the Circuit Court justified the judgment rendered by it, **it is going beyond its jurisdiction** in *imputing* any fault to the appellees, which is not expressed *in those findings*, and they will be searched in vain to find any charge of fault against the appellees.

The Circuit Court has held the appellees entitled to a full recovery *with interest* and with costs, and its conclusions of law are affirmed by this Court. *The logical result is that the appellee should have now what they should have had over four years ago*, and that can only be done by giving them full interest.

History of Rule 23.

Blatchford's Rules, p. 160.

Sub. 1. **Interest.**

Gen. Rules 17 and 18, February, 1803. 1 Cranch, xviii.; 1 Wheat., xvi.; 1 How., xxvi.

R. S., § 966. Act, Ch. 118, 1842, § 8 (5 St. at L., 518).

Sub. 2. **10% Damages** for Delay **in addition to interest.**

Gen. Rules 17 & 18. 1 Cr., xviii; 1 Wheat., xvi.; 1 Pet., vii.; 1 How., xxvi. Amd., May 1, 1871; 11 Wall., x.
R. S., § 1010. Act, Ch. 20, 1789, § 23 (1 St. at L., 85). Act, Ch. 40, 1803, § 2 (2 St. at L., 244). Act, Ch. 28, 1867, § 2 (14 St. at L., 386).

Damages *and interest* allowed.

Ins. Co. vs. Huchbergers, 12 Wall., 164.
Hall vs. Jordan, 19 Wall., 271.
Amory vs. Amory, 91 U. S., 356.
West vs. Wis. Rway. Co., 94 U. S., 100.

Proper to give damages.

Whitney vs. Cook, 99 U. S., 609.

Sub. 3. **Same rule applied in cases in equity.**

Dec., 1851, 13 How., v. (Rule 62). 21 How., xiii.*

Sub. 4. **In cases in admiralty interest shall not be allowed unless specially directed by the Court** (Oct., 1884, 108 U. S., 586). *New.*

Jennings vs. Brig Perseverance, 3 Dal., 338. Allowed *interest* on the *debt* (Prize Case).

The **Eutaw,** 12 Wall., 142 (1870), CLIFFORD, J.: "Appeals of the kind (admiralty) are usually regarded as brought for delay, and it may become necessary to amend the second article of the 23d Rule so that ten per cent. damages may be allowed *in addition to* **the interest** provided for in the *first article of that rule.*"

It was amended to effect the object March 10, 1890 (133 U. S., 710).

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*The revision of May, 1871, is not printed in any report (see Blatchford's Rules, p. v., where 1881 is printed instead of 1871).

Until 1884 (108 U. S., 586) there was **no rule** declaring that *interest, in admiralty cases,* was allowed only when *specially* directed by the Court, and the *notion* that such was the practice has arisen from a foot note to Rule 23, published in the *pamphlet* editions of the rules, December Term of 1870 (p. 20) and October Term, 1879 (p. 17; see also Ben. Ad., p. 388), as follows:

"Interest not allowed in admiralty unless specially "directed by the Court (20 How., p. 255)."

An examination of **Hemenway vs. Fisher,** 20 How., 255, shows that *no such question* was then before the Court.

It was decided in December Term, 1857. The case came up on a motion to correct the mandate by allowing interest. The case was an admiralty appeal from the Circuit Court of Massachusetts, and had been decided at the *last* term, and the mandate did not give interest. **The case was affirmed by a divided Court.*** The Court held the mandate had been correctly entered, pointed out that both the 17th and 18th rules were confined to cases brought up by writ of error, and that those rules were, *so far as admiralty was concerned,* superseded by the act of March 2d, 1803, which gave an *appeal* in place of writ of error, and, although adopted at February Term, 1803 (misprinted 1853 in the report), yet, as appeared by the minutes of the Court, the rules in question were adopted on March 2d, 1803, and Judge TANEY says (p. 259): "It is evi-"dent that they were carefully framed *with reference to*

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* It is respectfully suggested that such affirmance was erroneous, for it was an appeal in admiralty, which was at that date (1857) a *new trial* in the Supreme Court. The cause in the appellate court "is to be heard *de novo*, as if no sentence had been passed," says MARSHALL, J., in Yeaton vs. U. S. S. Ct., 5 Cranch, 283 (1809), and the *division* of the Court should have been treated like a disagreement of a jury.

x² An error. "Approved March 3d 1803" The result of this error is very important

" *this change in the law*, so as to exclude from their oper-
" ation admiralty and chancery appeals."

Justice TANEY then discusses an abstract proposition, which was merely *obiter*, as follows :

" No rule, therefore, fixing any certain rate of interest
" upon decrees in admiralty, whenever the decree is
" *affirmed*, could be adopted with justice to the parties.
" And a discretionary power is reserved *to add to the*
" *damages awarded by the Court below* further damages,
" by way of interest, in cases where, in the opinion of
" this Court, the appellee, **upon the proofs,** *is justly*
" **entitled** *to such additional damages.* But this allow-
" ance of interest is not an incident to the affirmance
" affixed to it by law or by a rule of Court. If
" given by this Court, it must be in the exercise of its
" discretionary power, and *pro tanto* is a **new** judg-
" ment.*

" In the case before us, no *new* judgment could be
" given in this Court, **because, upon the question**
" **of affirming or reversing the decree of the**
" **Circuit Court, the Justices of this Court**
" **were equally divided ;** *and the judgment was*
" *affirmed by operation of law, which from necessity*
" *affirms the judgment of the inferior tribunal when the*
" *Judges of the appellate Court are equally divided.*
" *Upon such an affirmance, the appellee was entitled to*
" *the full benefit of the decree of the Circuit Court, but*
" *nothing more. The Court, being equally divided,*
" *could not change the decree of the Circuit Court, nor*
" *exercise its discretionary power to allow interest on the*
" *decree ; for this would have been a new decree. And*
" *those Justices who were of opinion that the decree of*
" *the Circuit Court ought to be reversed* **because the**
" **damages were too high,** *were of course opposed*
" *to making it still higher by the addition of interest.*

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* And such a judgment ought in the case of an *admiralty* appeal to be given, as the law then was (the Baltimore, 8 Wall., 382 ; Rule 12, Supreme Court Rules).

The 12th Rule of this Court, Sub. 2, adopted in 1817 (2 Wheat., VII.), recognized the *right* to give *new* evidence *orally* in this Court, and it only voiced the earlier decisions.

The decrees formerly rendered by this Court in respect to *damages* were decrees on the facts, and *interest was allowed* or refused on the amount of the decree below, as the *facts* showed it was or was not *needed* to make up a proper *measure of damages.*

Thus, in **Hemenway vs. Fisher** (20 How., 260), TANEY, J., says: "And it will sometimes happen "in Admiralty Cases that this Court will think the "damages estimated and allowed in the Circuit Court "*are* **too high,** *and yet the opinion here may* **approxi-** "**mate** *so nearly to that of the Court below that this* "*Court would not feel justified in reversing its judg-* "*ment.* Besides new testimony may be taken here, "and a new aspect given to it."

"Restitutio in Integrum."

(The Baltimore, 8 Wall., 377, 385.) This only is the just measure of the recovery (The Cayuga, 14 Wall., 278), and this "*together* with interest," says CLIFFORD, J. (8 Wall., 386).

See also the Atlas, 93 U. S., 310. In the Alabama and Game Cock, 92 U. S., 697, this Court ordered that a decree "be made against the A. and G. C., and the "stipulators severally, each for one moiety of the en- "tire damage, *interest* and costs," and in the North Star (appealed before and decided since the Act of 1875) this Court affirmed the Circuit Court decree "with *interest* from its date," although the damages were divided; and so also in the Sterling, 106 U. S., 648.

When Congress reduced this Court's *jurisdiction* (for confining the *review* to the *law* in this *court* and taking away the *right* to *re-try* the facts, was *reducing* jurisdiction), it *logically* followed that the question of the *allowance of interest* by the Circuit Court came here for **review** as a question of **law** only, and not as a ques-

tion of either fact or discretion, and if "upon the *facts* "*found* by the Circuit Court" interest was *properly* allowed by that Court, this Court cannot *review* the reasons (either of fact or discretion) which moved the Circuit Court thereto, and the sole question for this Court is:

"*Is the 3d conclusion of* **law** (Record, p. 90, fol- "179) *which gives interest from the date of collision a* "*proper* **legal** *conclusion.*"

It has been settled too often by this Court to be questioned now that interest is properly allowed "in ad- "miralty" in collision cases (Sturgis vs. Clough, 1 Wall. 272).

In the **America,** 11 Blatch., 486, the Court says: "As to *interest*, it has been often said that in ac- "tions of tort, where the damages are unliquidated, "interest is not to be allowed as matter of law; but it "rests in the discretion of the jury. The proposition "is not unqualifiedly true, without exception. Thus, "in actions of trover, which is an action of tort, the "value of the property, *with interest thereon*, is held "to be the rule of damages. Where the value of the "thing lost, or the cost of repairs and the like, are the "test or measure of recovery, *and the amount of dam-* "*ages becomes mere matter of computation*, **interest** "**is as necessary to indemnity** as the allowance "of the principal sums. But, if the allowance of in- "terest rests in discretion, still the *indemnity* of "the party for injury from a collision occurring "through the fault of another vessel should be the "object of the Court in the allowance of damages. In "this view, such allowance was, I think, proper. It is, "in such case, not allowed as punishment. It is not "like the allowance of punitive damages in actions of "slander, assault and battery and like cases. It gives "indemnity only."

See to same effect

McCormick vs. Pa. R. R. Co., 49 N. Y., 315.

Andrews vs. Durant, 18 N. Y., 502.

See also
The Aleppo, 7 Ben., 136.
And Dyer vs. Nat. S. N. Co., 14 Blatch., 488, per BLATCHFORD, J.
And "Mary Eveline," 14 Blatch., 498, per HUNT, J.
Marsden on Col. (2d Ed.), 107.

The **English Courts of Admiralty** have recognized and enforced the rule of *restitutio in integrum*, and to give it full effect allowed *interest* on principles of high morality, bewailing, at the same time, the *deficiency* in justice administered by the common law courts in that respect.

Thus, Sir ROBERT PHILLIMORE in the **Northumbria**, L. R., 3 Ad. & Ec., 9 (1869), said:

"It is not denied that the practice of this Court has "been **invariable** as to allowing interest, but it is "contended that this practice is erroneous, at variance "with the *common law*, both before and since the "passing of the statute 3 and 4, Wm. IV., C. 42, and "moreover opposed to the enactment of the Merchants' "Shipping Act, Amendment Act, 1862. I was referred "to the case of Higgins vs. Sargent (2 B and C, 348), "and to 1 Chitty on Pleading, 7th ed., p. 412, to, "*shew* that no interest was allowed *at common law* in "cases of contract, with certain exceptions, or in cases "of tort, and that it was not till 3 and 4 William IV. "C. 42, was passed, that in certain actions the jury "could give damages in the nature of interest, and that "in these instances the wrongdoer had not destroyed "but taken possession of the goods, and, therefore, the "Legislature allowed interest to be recovered.

"If it were necessary to examine this proposition, I "should find it difficult to reconcile it with the recent "case of British Columbia Saw Mill Co. vs. Nettleship "(L. R., 3 C. P., 499).

"**But it appears to me quite a sufficient** "**answer to these authorities to say that** "**the ADMIRALTY, in the exercise of an** "**equitable jurisdiction, has proceeded** "**upon another and a different principle** "**from that on which the common law** "**authorities appear to be founded.**

"**The principle adopted by the Admiralty** "**has been that of the CIVIL LAW.**"*

"**That interest was always due to the** "**obligee when payment was not made** *ex* "*mora* **of the obligor, and that whether** "**the obligation arose** *ex contractu* **or** *ex delicto.*"

The learned Judge then examined the effect of the English Statute of Limitation of Liability, and concluded "that, notwithstanding the Merchants' Ship- "ping Act, some interest is payable on the *limited* "amount. I quite agree with the observations of "WOOD, V. C., in Straker vs. Hartland, 34 L. J. (Ch.), "at page 123: 'It was quite clear that **justice re-** "'**quired** that a debt which was due, but the pay- "'ment of which was delayed, *should carry interest.*'"

"The question is how are these principles affected "by the statutes which *limit the liability* of the wrong-

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* By Chap. 21, 1789 (1 S. at L. 93) § 2, "the form and modes of proceedings in Courts * * * of Admiralty and maritime jurisdiction shall be according to the course of the **civil** law."

By Chap. 36, 1792 (1 S. at L., 276), § 2, the language was changed to "according to the *principles*, rules and *usages* which "belong to courts * * * of admiralty, *as contradistinguished* "*from courts of common law.*"

By Revised Statutes, § 913, the language of the Act of 1792 is retained down to the words "as contradistinguished from courts of "common law," which are omitted.

This being the *statutory guide* of the Court, no reference to *principles* or usages of common-law courts is permitted, and what the Court must seek is the principles and usages of *admiralty* courts, and references to common-law cases as to interest are, therefore, forbidden and misleading.

" doer? In these statutes the Legislature introduced " a new principle the object of which was to give some " protection to the owner against the wrongdoing of " his servant—the master of the vessel. They pre- " served the principle of *restitutio in integrum*, in cases " where, with his actual fault and privity, the damage " had been inflicted on the sufferer, but, with this ex- " ception, they limited his liability to a certain defi- " nite sum. In the latter case, therefore, this limited " amount took the place of the *restitutio in integrum ;* **" but the principle still remains that the " liability to this amount attaches from " the time of the collision, and there seems " no reason why INTEREST should not " accrue on the delay to pay that limited " amount, as well as in the case where the " amount is unlimited."**

" Indeed the equity of the thing is the other way, " for to refuse this interest would be to *diminish* still " further the natural right of the sufferer to full com- " pensation for the injury which he has sus- " tained." * * *

" In the case of the Amalia (5 N. R., 164, *n.*, 34 " L. J., [P. M. & A.,] 21) Dr. LUSHINGTON remarked: " ' *Upon what grounds then was interest given? Interest was " not given by reason of indemnification for the loss, for " the loss was the damage which had accrued; but in- " terest was given for this reason, namely, that the loss " was not paid at the proper time. If a man is kept " out of his money*, it is a loss in the common sense of " the word, but a loss of a totally different description, " and clearly to be distinguished from a loss which " has occurred by damage done at the moment of " collision.' " * * *

In **"The Gertrude,"** 12 P. D., 206 (1887), the President (Sir JAMES HANNEN) said: " There can be no " doubt that it has been a long-established practice of " the *Admiralty* Court to allow interest on the amount " awarded to the plaintiff from the time when the claims

" arose. This practice was very fully considered by my " learned predecessor in the '*Northumbria*' (L. R., 3 Ad. " & Ec., 6), in regard to matters strictly 'within the " jurisdiction of the Admiralty Court.'"

"It is unnecessary for me to travel over the ground " again, since it is clearly established that, *in Admiralty* " *actions*, there should, as far as possible, be a com- " plete *restitutio in integrum*, **and, for this pur- " pose, the award of interest on the dam- " ages is necessary.**"

"It is a sound and equitable rule, and *I can only re-* " *gret that it is not also the common law rule.*"

In affirming the **"Gertrude"** in the Court of Appeals (L. R., 13 P. D., 108), Lord ESHER said: "It " has been further urged that, assuming these were " Admiralty cases, the practice in the Admiralty Divis- " ion of awarding interest *eo nomine* on the amount of "the assessed damages is wrong and should be over- " ruled, and the practice assimilated to that in the " Queen's Bench Division; but to this latter argument " I cannot accede, because *it does not seem to me that* " *there is anything unjust in the mode in which the* " *Admiralty Court has always assessed the damages.* " On the contrary, I am inclined to think it more just " than the common law rule."

Interest on *demurrage*, or the allowance for the detention of a vessel while repairing damages, is allowed, *at least* from the institution of the suit, both in admiralty and common law courts.

"The Alexandria," 10 Ben., 101.
Mailer vs. Express, &c., Line, 61 N. Y., 316.

And even when the owner avails himself of the statute for limitation of liability by giving stipulation for the appraised value, he is chargeable with interest thereon. "The Favorite," 12 F. R., 213.

R. S., § 966 (Ch. 188, 1842, Sec. 8, V. 5, p. 518): "**Interest shall** be allowed **on all judgments**

" **in civil** causes recovered in a *circuit* or district " court, and may be *levied* by the marshal, under " process of execution," &c.

The meaning of words " *civil* causes " in the above section is well settled.

Wiscart vs. Dauchy, 3 Dal., 321 (1796), ELSWORTH, C. J.: " An *appeal* is a process of civil-law " origin, and removes a cause entirely, subjecting *the* " *fact* as well as the law to a review and *retrial*."

He then states the distinction between *civil* actions as contra-distinguished from *criminal*, and says (p. 328): " Now the term *civil actions* would, from its natural " import, embrace every species of suit which is *not of a* " *criminal kind*; and, when it is considered that the Dis- " trict Court has a *criminal* as well as a *civil* jurisdiction, " it is clear that the term was used by the Legislature, " *not to distinguish between admiralty causes and other* " *civil actions*, but to exclude the idea of removing " judgments in criminal prosecutions from an inferior " to a superior tribunal."

The Supersedeas Bond.

R. S. § 1,000. Requires the Judge signing the citation on a writ of error to " take good and sufficient " security that the *appellant* shall prosecute his appeal " to effect, and if he fail to make his plea good shall " answer all *damages* and costs where the *writ* is a " *supersedeas* and *stays* execution."

The word " *writ* " in the above section is used in a generic sense, for there is no *writ* when there is an appeal, and yet the *appellant* is to prosecute his *appeal* and make his *plea* (meaning " appeal ") good.

Rule 29 of the General Rules of this Court instructs all Judges what they are to include in the "*damages*" for which security is to be taken, in these words: " *Super-* " *sedeas* bonds in the Circuit Courts *must* be taken with " good and sufficient security that the * * * ap- " pellant shall prosecute his * * * appeal to effect

" and *answer all damages* and costs if he fail to make
" his plea good. *Such indemnity where the* judgment
" or *decree* is for the recovery of money not otherwise
" secured, *must be* for the whole amount of the * * *
" decree, **including** just **damages** for delay and
" costs and **interest** on the appeal."
108 U. S., 590.

Under this statute *and rule* the appellants gave the bond on appeal found in the record *(p. 106, fol. 216)*, in the sum of $80,000 to secure a judgment for $60,223.12 (p. 104), and libellants are entitled to the full benefit of it.

The appeal was a *supersedeas* and did stay execution, and the claimants have had the use of this large sum of money, decreed in October, 1888 to belong to the libellants, for *over four years*, presumably earning interest on it while depriving the libellants of its use.

Such conduct is *immoral*, and to refuse interest offers an inducement for *frivolous* appeals such as this was.

The *supersedeas*, since the Act of 1875, does not *vacate* the decree of the Circuit Court; it merely stays it until this Court decides that it was *properly* rendered, and, having so decided, the stay ends and the decree becomes operative, as if it had never been suspended.

The Act of 1875.

The Abbottsford, 98 U. S., 445: " By the
" Constitution, Amend. VII., no fact tried *by a jury* can
" be otherwise re-examined in any court of the United
" States than according to the rules of the common law.
" It follows that had this case been tried by a jury it
" could not be re-examined on the facts in this Court,
" because, under the rules of the common law, a bill of
" exceptions could not be used *for that purpose* (p. 443).
" The facts as found and stated by the Court below are
" conclusive. The case stands here *precisely the same*
" as though they had been found by the verdict of a
" jury."

" Since, therefore, the *bill of exceptions* in this class " of cases is to be taken *as in actions at law*, it follows " **MOST UNMISTAKABLY that only " such rulings are to be presented by it for " our consideration as could properly be " put into a bill of exceptions on a trial of " an action at law."**

The **Francis Wright,** 105 U. S. 387, " We " conclude therefore, that the Act of February 16, 1875, " Ch. 77, is constitutional, and that under the rule laid " down in the *Abbottsford* (98 U. S., 440) and uniformly " followed since, our inquiries are confined to **ques-" tions of law arising on the record,** and to " such rulings excepted to at the time *as may be pre-" sented by a bill of exceptions* prepared as in actions " at law."

There was *no* question of law as to the *amount* of damages presented by this appeal, nor as to the right of libellants to interest, and this Court has *no power* to deprive the libellants of *any part* of the *result* of the affirmance of the Circuit Court decree. *The evidence showing the amount of damages was not sent to this Court*, and there was no statement in the record that it embraced "*all* the evidence," and such statement was necessary before it could be so assumed (Wiggins vs. Buckham, 10 Wall., 129).

Damages.

The decree affirmed is the *decree of the Circuit Court*, entered October 27, 1888 (Record, pp. 102 to 104).

§ **1010 R. S.** (Ch. 20, 1789, §§ 23, 25, VI. p. 185): " Where, upon a writ of error, judgment is affirmed in " the *Supreme* Court or a Circuit Court, the Court " *shall* adjudge to the respondent in error *just damages* " *for his delay*, and single or double costs at its dis-" cretion."

This is *mandatory.*

"Damages" and "interest" says Rule 23 of this Court—(different names for different things); and, while § 1010 *may* not be applicable to an admiralty appeal, *even since* the Act of 1875, it is plain that the right to interest given by § 966 and the Act of 1842 (Ch. 118, § 8), which came after Rule 23, **is a right attached to all judgments of the Circuit Court, and only SUSPENDED when the appeal operates as a SUPERSEDEAS.**

"WHY?"

The cargo owner, the ship owner, the representatives of the *drowned* captain of the "Helen" are all put in one category and all deprived of *more than four years interest* on the amount of their respective damages (or at 6% over 25% of the whole amount), and without a line of *reason* given for it.

These *English* owners may well wonder why the highest Court in the United States has so treated them. The comity of nations, which opens the courts to aliens, requires that the foreigner should be treated with even more consideration, in administering *justice*, than the citizen who has a voice in making the laws and can change them, and when oppressive force a repeal, if public sentiment shows a desire therefor—but the foreigner is *voiceless*, and necessarily can only wonder.

The proofs before the Circuit Court.

If any *latent* doubt as to the justice of libellant's claim exists, a perusal of the deposition of Dawson (used before the Circuit Court and excluded from the record on appeal only because the Circuit Judge did not deem it material), fortified by the extracts from Evans, Towson and

Bowditch, all of which are set out in the appellee's moving affidavit, must convince this Court that the "*deviation*" of the "Helen's" compass was absolutely proved —and accepted by the Circuit Judge—and when to that is added the fact that by the conduct of the steamship, so justly called "**reckless**" by this Court, her captain (the one witness who knew all about her deviation) was drowned, and her "*deviation card*" lost, enough is shown to remove every shadow of suspicion from the testimony of the bark's crew.

(See deposition of Dawson and certificates of Hon. Wm. J. Wallace and Hon. Addison Brown in moving papers.)

Lastly. If the above argument is followed to its legitimate results, this Court will *retract* what it has *so severely* said against the witnesses on the "Helen."

Taylor, the mate, a young man of 20, just entering on his career when this collision happened in 1879, was branded in 1884 (15 F. R. 624) as a willful perjurer by Judge ADDISON BROWN; and, if not expressly cleared, at least was not attacked by the Circuit Court in 1888 (35 F. R., 604); and with the conclusive proof of *deviation* of the "Helen's" compass made in that Court, and necessarily *accepted* by it when it found the bark's course was N. E., and the wind between S. W. and S. S. W., I say, Taylor will go down to posterity characterized by the opinion of this Court as unworthy of belief, and so characterized *because* the Circuit Judge did not see fit to find "deviation" as a fact —a scientific fact *as well established as magnetism itself*—and because this Court has not seen fit to accept the works of science offered to it, because they do not appear in the record, although now shown to have been put in evidence on the trial in the Circuit Court, and not sent to this Court because libellants had no power to *appeal* from a judgment, in every respect and to the fullest extent, in their favor.

The sense of justice and humanity of this Court is invoked to review what it has said in view of the matters now presented, and to do that justice to the crew of the Helen which they are entitled to receive at its hands; and if, when that has been done, the Court sees that the appeal is frivolous, then to award such damages as well as interest as they think will compensate for the four years' delay and expenses the libellants have been so unjustly put to.

February 17th, 1893.

Respectfully submitted,
GEO. A. BLACK,
Counsel for Libellants,
44 Pine Street, N. Y.

See pp 46 & 47 of Libellants Original Brief

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Supreme Court of the United States.

JOHN E. ALEXANDRE,
and others,
Claimants of S.S. "City of New York,"
Appellants.

vs.

JOHN MACHAN,
and others,
Appellees.

BRIEF FOR APPELLANTS,

IN OPPOSITION TO MOTION FOR A CHANGE OF THE DECREE HEREIN.

ROBERT D. BENEDICT,
A. OLDRIN SALTER,
Of Counsel for Appellants.

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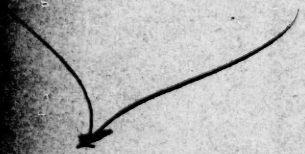

Supreme Court of the United States.

JOHN E. ALEXANDRE *et al.*,
Claimants of the Steamship
City of New York,
Appellants,

vs.

JOHN MACHAN *et al.*,
Appellees.

Brief of Counsel for Appellants in opposition to Motion for a change of the Decree herein.

Inasmuch as the proctor for the libellants in his papers on this motion has gone outside of the record which is on file in this Court, and has brought before this Court matters, which were not stated in said record, as to occurrences during the progress of this cause, it may be proper for us to make a statement on behalf of the appellants.

Accordingly, we beg leave to say to this Court as follows:

The questions at issue in this case on the trial of it in the District Court were simple. The libellants alleged that the bark was sailing E. by N. ¼ N., and that by the porting of her helm, she swung about a point to starboard—this making her heading at the collision about E. or E. ½ N.

The respondents alleged that the course of the bark

had been about N. E. by N., and that at the collision she was heading about East.

As to this heading of the bark at the collision there was no question made. The pleadings substantially agreed about it; all the witnesses testified to substantially the same thing, and the counsel for both parties so treated the case. It was agreed on all hands that the bark at the collision headed about east or east by north.

The contested point was as to what had been the bark's course before she knew of the steamer's approach. The question was, as the District Judge said (Record, fol. 42): "How did the bark come to be heading east or east by north at the time of the collision?"

Did she, as her mate Taylor swore, first change at 8.15, which was two hours and thirty-five minutes before the collision, from a course of northeast or northeast by north to a course of east by north one-half north (two and a half or three points), and then change about a point on the steamer's approach? Or was the change from northeast by north to east made all at once and after the approach of the steamer was known?

We maintained, and we convinced the District Judge, that Taylor's story, that the course of the bark was changed to E. by N. ½ N. two hours and 35 minutes before the collision, was untrue. We showed that such could not have been her course for that time, because in order to have made such a course the bark must have been *ashore* before she made that change.

But the counsel for libellants maintained most strenuously that she did make that change. He did not rest on the mate Taylor's evidence alone. He gave at great length *expert* testimony to show that that course of E. by N. ½ N. was a proper course. He sought to prove the existence of an adverse current holding back the bark so that she might have sailed

on that course for two hours and thirty-five minutes before the collision, and he called witnesses by whom he sought to prove that the bark had actually been so near the shore during the day that a course of E. by N. ½ N. for that time would have brought her to the place of collision.

No idea was suggested on that trial that the course of the bark *at the collision* was other than about east or east by north. No idea was suggested that the Court might find that her course was northeast before the steamer's approach was known, and yet might find that her change of course after the approach was known was only a change of a point or so before the collision.

The question turned on the truth of Taylor's (the mate's) evidence. On this point we argued that he was not telling the truth, aside from the impossibility of his story, from many things in his evidence; as, for instance, that though he testified in the case that the wind was west-southwest, he had previously testified twice in an examination before the Consul (as we proved by the stenographer's minutes of that examination) that the wind was S.S.W., which agreed with our claim as to the bark's course, and we also drew similar conclusions from the evidence which he gave as to the lights which he saw.

The District Judge was convinced that Taylor's story was false, and, that being so, his conclusion was that the bark's course was about N.E.; and the further conclusion that she made a change of about four points followed necessarily; and he therefore decided that the bark made such a change, and was in fault therefor.

Up to this time no suggestion had been made of any claim that the compasses of the bark had been affected by any deviation, or did not tell a substantially true story.

It follows, therefore, that either (1st) the libellants'

counsel, knowing all the while that the compasses of the bark were affected by a deviation, had purposely left that fact out of his case, or (2d) that he got the idea of deviation, as a possible way of getting out of the difficulty arising from the mate's story, *after the case had been decided.* We think the latter to be the true situation, not that he had obtained any new information as to the bark herself, but that it had occurred to him that such might have been the case.

And so, by his new pleadings in the Circuit Court, he sought to inject this new fact into the case. He did take the deposition of Dawson, which he has attached to his affidavit on this motion, and we think it is quite likely that he read on the argument from the scientific works of which he speaks.

We paid very little attention to the evidence which he offered on this subject, because, as is manifest, it only showed that there is such a thing as deviation, which, however, varies so much on different vessels, according to their mode of construction and to many other circumstances, that no one could tell what was the fact as to any one vessel except by knowledge of that particular vessel. The only question to be considered in this case was whether there was, in fact, a deviation of the compasses of *this bark Helen* which made her actual course two points or more different from what the compass showed. This the libellants' counsel alleged, and this the claimants positively denied.

Now, in the first place, the burden of proof on this question was on the libellants. And they furnished not a particle of proof as to the *Helen* herself. Of all the navigators who sailed her from the day she was launched till the night she was sunk they called not one.

In the next place, it was utterly incredible that, if there were such a condition of things on the *Helen*, the mate should not have known it. He had sailed

her for months, during which he must have taken many observations (he had taken one on the day of the collision) and steered many courses, and it had been his duty every day to enter in his log the direction of the wind and the courses steered by the bark; and to charge him with never learning in all that time that the compasses, by which the course of his vessel was to be governed, did not tell him a true story, was to make a charge of the grossest ignorance and incapacity against both him and his dead captain.

And, furthermore, the evidence of Taylor himself as to the bark and her navigation proved that no such fact could have existed. For, if such a fact had existed, his vessel could not have been navigated during the day as he swore she had been; the wind could not have blown as he swore it did; the land could not have been seen as he swore it was; the lights which he saw could not have borne in the directions in which he swore they did. And to this was coupled his evidence that there was no difference between the deck compass and the standard compass, which was placed in the crosstrees to guard it against any injurious influences.

With these arguments and such as these, we convinced the Circuit Judge, we think, that there was no deviation in the compass of this bark. We say we convinced him of this, because we cannot think it possible that he should have believed that there was such a deviation in her compass, and yet that he should have refused to find the fact of deviation, though requested so to find; or that he should have made no allusion in his opinion to such deviation, or that he should have written in his opinion the words, "It may be conceded that the mate * * * is not *entitled to any credit.*"

The question whether there was such a deviation

in the compass of this bark having been thus a distinct issue, and the Circuit Judge having refused to find for the libellants on that issue, we had the right, as we conceive, to treat the case before this Court on the theory that no such fact existed, and to have the case so treated. Any other view would make *the refusal to find* a fact the equivalent to a *finding* of the fact.

But the libellants' counsel, while insisting that the appellants were bound by the findings of fact, and could not go outside of them, roundly refused to be so bound himself, and devoted a large portion of his brief and of his oral argument before this Court, as he has also of his papers on this motion, to an attempt to convince this Court that, although the Circuit Court had refused to find that there was the deviation in the bark's compass which he claimed, there was in fact such a deviation, and that this Court must dispose of the case as if the Circuit Judge had found it.

We had no remedy against this transgression of rules. The man who disregards rules always has an advantage over his opponent who abides by them. And if the Court saw fit to hear counsel on matters which were not in the case, all we could do was to do as we did, viz.: to call the attention of the Court to the fact that they were outside of the case.

On this motion the libellants' counsel has taken the same course, and has filled his moving papers with matters outside of the record. We have only followed him so far as to show to the Court the situation of the case and its history. We have not undertaken to *set forth* the evidence, not in the record, which was before the Circuit Court, and which sustained the position of the appellants in this case.

Having done this so that the Court may clearly understand the situation, we claim on behalf of the appellants that this Court should refuse to consider

all these matters, and that the case is to be disposed of, and this motion is to be disposed of on the basis of its being taken as a fact that there was no deviation in the compass of the bark.

It thus appears that on the question of fact, which was the main issue in the District Court, viz., as to the course of the bark before the steamer's approach was known, the District Court decided against the bark, and in favor of the steamer, and decided that the mate of the bark, Taylor, had sworn falsely.

It also appears that the Circuit Judge made the same finding as to that issue, and also decided that the mate "was not entitled to any credit."

It furthermore appears that on the new issue raised by the libellants in the Circuit Court, viz., whether there was a deviation in the bark's compass, the Circuit Judge also decided against the bark and in favor of the steamer.

And yet the Circuit Judge rendered a judgment entirely in favor of the bark, arriving at that result by finding a course for the bark *at the collision*, which was contrary to the allegations of both parties, and contrary to the evidence of all the witnesses from both vessels. This was a very great surprise. The idea, that it was possible that the Judge, while finding that there was no deviation, might find such a fact as to the heading of the bark, had never occurred to our minds; and, if it had, we should have been powerless to guard against it. He might just as well have found that the bark made no change of course at all, or that the steamer's engine was not stopped before the collision, or that the steamer had no navigator in charge, or any other fact which was outside of, or contrary to, the pleadings and the evidence.

We advised an appeal from that decree with great confidence, because, although we knew that this Court would feel the force of the finding of fact made by the Circuit Judge, we thought that where

the pleadings of both parties and all the evidence in the cause concurred as to the heading of the bark at the collision, the finding of the Circuit Judge that she was heading otherwise might be held by this Court to have been a legal error, calling for a reversal of the decree.

This Court has, however, held that it was bound by the finding of fact of the Circuit Judge.

With great respect for this Court, we beg leave to say that we think such decision was an error.

It cannot fail, as, we think, to weaken the rule which has for so long a time required a party in Admiralty to set forth his case truthfully in his pleadings. Many cases will arise in the future, as they have done in the past, in which a party, who has made allegation of some fact, afterwards finds that, in connection with other facts, it is injurious to his case, so that he wants to have the Court disregard his allegation; and he will refer to this case and say: "In the case of the *City of New York*, although pleadings and witnesses all agreed that at the collision the bark was heading east, the Supreme Court gave the bark a decree because it was found she was heading northeast by east."

In other words, the rule of the Admiralty that the party can only recover "*secundum allegata et probata*" is not followed in this decision, and the rule must now be stated that a party may recover, NOT "*secundum allegata et probata*," if the Judge sees fit to find a fact outside of them.

We, however, perceive that, as the decision of this Court now stands, it may at least be argued that this Court did not desire this result, although it felt itself constrained to accept the finding of the Circuit Judge; and that it marked its disapprobation of the situation of the case and of the false evidence by which, according to the decisions of both the lower courts,

the libellants' case was tainted, by refusing to give interest on the judgment.

We do not propose to take time to discuss whether this Court has the power to refuse interest since the Act of 1875. Inasmuch as in 1882 this Court made the rule that in all cases in Admiralty interest should not be allowed "unless specially directed by the Court," and in 1890 changed it to its present form, viz.: "In cases in Admiralty damages and interest may be allowed *if specially directed by the Court*," it seems to us idle to discuss whether this Court has the power to make or refuse such special direction.

And, if this Court has the power by a refusal of interest to mark its condemnation of a case which is tainted by the evidence of a chief witness whom both of the lower courts held to be false and unworthy of any credit, we beg leave to say that in our opinion it is due to the high reputation of this Court and to the watchful care and strong influence which it has always exerted upon the side of veracity in litigation, that it should not withdraw the condemnation upon untruth, which it has expressed by its refusal of interest. It should at least say to these libellants, "We decline to treat your case as we should have treated it if it were free from the taint of untruthfulness. On the contrary, we mark our disapproval by refusing you that interest on your decree which it is in our discretion to give or to withhold."

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